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#95021

No.
STATE OF NEBRASKA
OFFICIAL
MAR 15 1995
DEPT. OF JUSTICE

DATE: March 15, 1995

SUBJECT: Authority of State Board of Equalization and Assessment to Rescind or Modify Prior Equalization Order.

REQUESTED BY: M. Berri Balka, State Tax Commissioner

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

In your capacity as Secretary of the State Board of Equalization and Assessment [hereinafter the "State Board" or "Board"], you have requested our opinion as to whether the State Board has authority or jurisdiction to take certain action with respect to its equalization order entered on August 15, 1994, ordering an increase of ten percent to the class of residential property in Douglas County, Nebraska.[1] The order was entered pursuant to the Board's authority to "raise or lower the valuation of any class or subclass of property in a county when it is necessary to achieve intercounty equalization." Neb. Rev. Stat. § 77-508.01 (1990).[2] While the Board's action was subject to appeal

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[1] The order increasing Douglas County residential property values by ten percent excluded new homes added to the tax rolls in 1993 and 1994.

[2] To perform its annual equalization function, the Board has "the power to increase or decrease the value of a class or subclass of real property of any county or tax district or property valued by the state. Such increase or decrease shall be made by a percent." Neb. Rev. Stat. § 77-506 (Cum. Supp. 1994).

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to the Court of Appeals by "any person, county, or municipality affected thereby", no such appeal was taken. Neb. Rev. Stat. § 77-510 (Cum. Supp. 1994). Your specific questions are: (1) Whether the Board may rescind the order; (2) Whether the Board, if it cannot rescind the order, may modify the order by excepting additional classes of real property from the increase; and (3) Whether, if the Board cannot rescind or modify the order, it may adopt a motion to effect the 1994 valuations in Douglas County.

To the extent the Board now feels that it treated some taxpayers unfairly in 1994 we would like to be able to advise the Board that it can now go back and change its action and that the courts would uphold the change. Unfortunately, the courts have made it very clear that under current Nebraska law, the Board must do the job right the first time. Once the time for appeal has passed, neither the Board nor the taxpayer is given a second chance under Nebraska law as interpreted by the Nebraska Supreme Court. From a fairness standpoint, consideration should be given to amending Nebraska law to allow taxpayers whose properties are valued at over 100% of actual value in the future to appeal their individual property valuations following an increase in valuation by the Board.

For the reasons set out below, we must conclude that the Board lacks legal authority or jurisdiction to rescind or modify its prior equalization order for Douglas County. Nor does the Board have any authority to adopt a motion or take any other action affecting the valuations established as a result of its order. This conclusion is compelled by the Nebraska Supreme Court's recent decision in ***Adams County v. State Bd. of Equal.***, 247 Neb. 179, 183, 525 N.W.2d 629, 631 (1995), in which the Court held that the Board "did not have jurisdiction to revisit its prior orders after the time for appeal passed." This conclusion is also compelled by Nebraska constitutional and statutory provisions outlining the power and jurisdiction of the Board. At this point in time, the only legal mechanism which could conceivably alter the Board's action would be the institution of a collateral attack by an affected taxpayer. ***See Adams County,*** 247 Neb. at 183, 525 N.W.2d at 631 (noting that "actions of the Board are subject to collateral attack where the Board exercises a power not conferred upon it by law.") (***citing Hacker v. Howe,*** 72 Neb. 385, 101 N.W. 255 (1904)). We believe, however, that such a collateral attack would likely be unsuccessful.

Because of the importance of the questions presented, and the obvious ramifications for many taxpayers in Douglas County, we are compelled to address at length the basis for our opinion. In addition, we believe it is imperative that we take this opportunity

to fully explain the process involved in the valuation and equalization of property for tax purposes, which we feel is necessary to provide a more complete understanding to all interested persons to fully advise them of their rights under the law, and the procedures necessary to preserve and protect their rights as individual taxpayers to ensure that they are treated fairly with respect to the taxation of their individual properties.

I. Nebraska Constitutional and Statutory Provisions.

The Nebraska Constitution provides that "[t]he necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct." Neb. Const. art. VIII, § 1. This provision further requires that "[t]axes shall be levied by valuation uniformly and proportionately upon all real property. . . ."[3] The Constitution further provides that the State Board "shall have power to review and equalize assessments of property for taxation within the state." Neb. Const. art. IV, § 28.

Except for agricultural and horticultural land, "all real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value." Neb. Rev. Stat. § 77-201(1) (Cum. Supp. 1994). The Legislature, pursuant to art. VIII, § 1, has provided the method of determining the taxable value of real property for tax purposes. Neb. Rev. Stat. § 77-112(1) (Cum. Supp. 1994) provides that "[a]ctual value of real property for purposes of taxation shall mean the market value of real property in the ordinary course of trade."[4]

The State Board "shall annually equalize the values of all real property as submitted by the county assessors on the abstracts of assessments. . . ." Neb. Rev. Stat. § 77-505 (Cum. Supp. 1994).

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[3] Article VIII, § 1, also recognizes that "the Legislature may provide that agricultural land and horticultural land, as defined by the Legislature, shall constitute a separate and distinct class of property for purposes of taxation and may provide for a different method of taxing agricultural land and horticultural land which results in values that are not uniform and proportionate with all other real property. . .but which results in values that are uniform and proportionate upon all property within the class of agricultural land and horticultural land."

[4] The Legislature has, of course, provided a different method for determining the taxable value of agricultural and horticultural land. Neb. Rev. Stat. § 77-112(2) (Cum. Supp. 1994).

"Pursuant to section 77-505, the State Board of Equalization and Assessment shall have the power to increase or decrease the value of a class or subclass of real property of any county or tax district. . . . Such increase or decrease shall be made by a percent." Neb. Rev. Stat. § 77-506 (Cum. Supp. 1994).[5] "Pursuant to section 77-506, if the State Board of Equalization and Assessment finds that a just, equitable, and legal assessment of the property in the state cannot be made without increasing or decreasing by a percentage the value of a class or subclass of property as returned by any county, the board shall issue a notice to the counties which it deems either undervalued or overvalued and shall set a date for hearing [which it may be direct be conducted by the Tax Commissioner] at least five days following mailing of the notice." Neb. Rev. Stat. § 77-508 (Cum. Supp. 1994). "The State Board of Equalization and Assessment shall, pursuant to section 77-508, raise or lower the valuation of any class or subclass of property in a county when it is necessary to achieve intercounty equalization." Neb. Rev. Stat. § 77-508.01 (1990). "After a hearing conducted pursuant to section . . . 77-508, the State Board of Equalization and Assessment shall either (1) enter its order based on information presented to it at the hearing, or (2) meet to hear the recommendation of the Tax Commissioner based on information presented to him or her at the hearing." Neb. Rev. Stat. § 77-509 (Cum. Supp. 1994). An order of the Board entered pursuant to this section must be sent to county officials by August 15, and "shall specify the percentage increase or decrease and the class or subclass of property affected or the corrections or adjustments to be made to the class or subclass of property affected." *Id.*

The authority of the State Board to adjust valuations pursuant to its equalization power must be exercised on or before August 15

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[5] It has been suggested that the Board may act under its power to "increase or decrease the value of real property of any county" under this section at this time to "decrease" the increase ordered for residential property values in Douglas County. As will be noted *infra*, this is inconsistent with both the Nebraska Supreme Court's decision in ***Adams County***, and the statutes governing the Board's exercise of its equalization powers. Section 77-506.01 provides that this power to increase or decrease the valuations of property by class or subclass is to be exercised "[p]ursuant to section 77-505". Section 77-505 authorizes the Board to "annually equalize" values of real property in the state. The Board's annual equalization authority expires when it acts by August 15 of each tax year, or, at most, when the ten day appeal time provided under § 77-510 expires. That time has long since passed here.

of each year, the last date on which the Board may certify values to the county assessors. "Each county shall be bound by the value established by the board", until the Court of Appeals (or the Supreme Court), "pursuant to an appeal prosecuted pursuant to section 77-510," "rules otherwise". Neb. Rev. Stat. § 77-509 (Cum. Supp. 1994). Within ten days of the Board's entry of any final action or decision with respect to the equalization or valuation of any property, "any person, county, or municipality affected thereby" may prosecute an appeal to the Court of Appeals. Neb. Rev. Stat. § 77-510 (Cum. Supp. 1994). The appeal provided by § 77-510 is the "exclusive method for appealing an action of the State Board. . . ."

II. The Supreme Court Decision in ***Adams County.***

In ***Adams County***, numerous counties, cities, and school districts filed petitions with the State Board in 1993 requesting that the Board vacate and set aside orders entered by the Board in 1991 to "equalize" the valuations of numerous centrally assessed taxpayers at zero value after the prosecution of appeals by the taxpayers from Board action taken in 1989 and 1990. No appeal was taken from the Board's 1991 orders. The political subdivisions requested the Board to vacate these orders on the ground that the action taken was erroneous and unlawful because it was contrary to remedial action approved by the Nebraska Supreme Court in subsequent cases. 247 Neb. at 180-81, 525 N.W.2d at 630; ***see MAPCO Ammonia Pipeline Co. v. State Bd. of Equal.***, 242 Neb. 263, 494 N.W.2d 535 (1993), ***cert. denied*** ___ U.S. ___, 113 S. Ct. 2930, 124 L. Ed. 2d 681 (***MAPCO II***); ***MAPCO Ammonia Pipeline Co. v. State Bd. of Equal.***, 238 Neb. 565, 471 N.W.2d 734 (1991) (***MAPCO I***). The State Board dismissed the petitions to vacate for lack of jurisdiction, and the political subdivisions appealed.

On appeal, the Nebraska Supreme Court stated that the "sole issue" was "whether the Board ha[d] jurisdiction to vacate or set aside its own orders after the statutory time for judicial review ha[d] expired." 247 Neb. at 182, 525 N.W.2d at 631. The Court noted the general rule that "an administrative agency may only reconsider its decisions until the aggrieved party institutes judicial review, or the statutory time for such review has expired." ***Id.***. Acknowledging that the time for appeal of the orders had passed, the political subdivisions argued that the Court should recognize an exception based on "extraordinary circumstances". ***Id.***. The Court specifically declined to adopt a rule allowing such an exception. Stating that "[t]he Board derives its powers from the Nebraska Constitution and from statute",. . . it concluded that "[t]he Board's powers are limited to those granted by the state Constitution and statute. Continuing

jurisdiction is not one of the Board's enumerated powers." ***Id.*** at 183, 525 N.W.2d at 631 (***citation omitted***).

The Court noted that the political subdivisions contended that the Board's orders were "`illegal, based on erroneous conclusions of law, [and] without. . .authority.'", and were therefore subject to collateral attack under the Court's decision in ***Hacker v. Howe,*** 72 Neb. 385, 101 N.W.2d 255 (1904). 247 Neb. at 183, 525 N.W.2d at 631. The Court noted that "present case [was] not a collateral attack", and concluded the Board properly found "that it did not have jurisdiction to revisit its prior orders after the time for appeal had passed." ***Id.***. Because it found the Board had no jurisdiction to act, the Court held it also had no jurisdiction, and dismissed the appeal. ***Id.***.

Based on the Nebraska Supreme Court's decision in ***Adams County,*** we are compelled to conclude that the Board has no legal authority or jurisdiction to rescind or modify its equalization order entered on August 15, 1994, increasing the valuations of residential property in Douglas County by ten percent. As was the case in ***Adams County,*** "any person, county, or municipality affected" by the order was entitled to appeal the order. Neb. Rev. Stat. § 77-510 (Cum. Supp. 1994). Neither Douglas County, nor any municipality (including the City of Omaha), nor any person affected by the order appealed the Board's action. The order was entered on August 15, 1994, and the statutory ten day appeal time expired on August 25, 1994. The decision in ***Adams County*** mandates the conclusion that the Board now has no legal authority or jurisdiction to revisit the decision it made last August with regard to Douglas County, or any other action taken by the Board on that date.[6] This would necessarily include any attempt to rescind or modify the order, or any motion or other action the Board may attempt to take which would alter the effect of the order.

III. <u>The ***Adams County*** Exception.</u>

The decision in ***Adams County*** does indicate that a "collateral attack" on Board action may be instituted in cases where the Board has "exercise[d] a power not conferred upon it." 247 Neb. at 183, 525 N.W.2d at 631. In this regard, the Court cited its decision in ***Hacker v. Howe,*** 72 Neb. 385, 393, 101 N.W. 255, 258 (1904), where

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[6] We note that appeals from Board action making percentage adjustments to classes or subclasses of property last August were taken by two counties. Both cases are presently pending in the Court of Appeals. ***Sheridan County v. State Bd. of Equal.,*** No. A94-798; ***Sarpy County v. State Bd. of Equal.,*** No. A94-790.

it stated that Board actions were subject to collateral attack only "upon grounds of fraud, actual or constructive, or for the exercise of a power not conferred upon them by statute." At this time, institution of a collateral attack by an affected person is the only legal mechanism to challenge the Board's action last August. We do not, however, believe that such a legal challenge would be successful. The Board is specifically authorized by law to order the type of percentage adjustment to a class or subclass of property made in Douglas County to achieve intercounty equalization. ***See*** Neb. Rev. Stat. §§ 77-506, 77-508, 77-508.01, and 77-509 (1990 and Cum. Supp. 1994). While the justice, wisdom, or expediency of that decision may now be questioned by some, it cannot be said that the Board's action was not authorized by law.

Indeed, the Nebraska Supreme Court has previously addressed an issue virtually identical to that which would be presented by any collateral attack against the Board's percentage increase of residential property in Douglas County. ***S. S. Kresge Co. v. Jensen,*** 164 Neb. 833, 83 N.W.2d 569 (1957) ["***S. S. Kresge***"]. In ***S. S. Kresge***, the taxpayer, an owner of business personal property subject to taxation in Douglas County, brought a declaratory judgment action against the County Treasurer, various political subdivisions in Douglas County, and the State, challenging its liability for personal property taxes for 1953.[7] The company had filed tax returns for its personal property with the County Assessor. These values were accepted by the County Assessor, and the company did not protest the valuations before the county board of equalization. The State Board subsequently ordered an increase in the valuation of business personal property schedules in Douglas County of forty percent. The County Treasurer then demanded payment of taxes assessed against the company based on the valuations as increased by the action of the State Board. ***Id.*** at 834-36, 83 N.W.2d at 571-72. The company contended the increase was "unlawful", arguing that it had reported its property for taxation at its "actual value", and that the Board's action "had the effect of taxing the property included in its business schedules at 140 percent of actual value." ***Id.*** at 837, 83 N.W.2d at 573.

The Court in ***S. S. Kresge*** began its discussion by noting the process by which the value of the company's personal property was established:

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[7] While the State was named as a defendant in the case, the Supreme Court held that it was not a necessary party to the action. 164 Neb. at 837, 83 N.W.2d at 573.

> [T]he company listed its stock and merchandise and furniture and fixtures and placed its own value thereon. This value was accepted by the county board of equalization and the company took no exception thereto, nor did it appeal therefrom. It is therefore a finding by the county board of equalization, acting quasi-judicially, of the actual value of the property for tax purposes. But it is only one step in determining the value of the property for taxation purposes. After the county board of equalization has fairly and impartially equalized the valuations and heard grievances and complaints regarding the assessments made, and acted to review and correct the same, it is the duty of the State Board of Equalization and Assessment to equalize assessments between the different counties to effectuate the uniformity and proportionate value provisions of the Constitution. In accomplishing this purpose the State Board of Equalization and Assessment is empowered to increase or decrease the aggregate valuation of any county by a percentum. Upon certification of such increase or decrease to the county clerk, it is mandatory upon such clerk to put the order in effect. As has been stated, such an order was made in the instant case increasing the value of property listed as business schedules by 40 percent. The company did not appeal from this order. Consequently, the method of attaining the taxable value of the company's property as prescribed by the Legislature was followed and no appeals taken therefrom.

Id. at 838-39, 83 N.W.2d at 573-74.

The Court continued by noting the different functions and powers exercised by county boards of equalization and the State Board:

> It is the function of the county board of equalization to determine the actual value of property for taxation purposes. While the county board of equalization acts in a quasi-judicial capacity and its valuations are final as to individual taxpayers unless appealed therefrom, such valuations are subject to the powers of the State Board of Equalization and Assessment, which powers have been described by this court as being purely incidental to a proper equalization of the assessment of the different counties of the state as reported to that body.
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> * * *

> We necessarily conclude that as to an individual taxpayer the remedy for overvaluation or a failure to receive a uniform and proportionate valuation of his property at the hands of the county board is by direct appeal to the courts and not by a collateral attack.

Id. at 839-40, 83 N.W.2d at 574.

In ***S. S. Kresge***, the Court noted there was no contention that the assessment made by county board of equalization was "void, or that it resulted from willful discrimination or other fraudulent conduct on the part of the assessment or equalization officers." *Id.* at 840, 83 N.W.2d at 574. It therefore concluded the county board's action was not subject to collateral attack. With respect to the contention that the action of the State Board was improper because it resulted in the taxation of the company's property at 140 percent of its actual value, the Court noted that "[n]o appeal was taken from the order of the state board by the company, and, in fact, the validity of its order is not questioned. The company is now in no position to question the validity of the order of the State Board of Equalization and Assessment." *Id.* at 840, 83 N.W.2d at 575. Addressing the company's claim that the action of the State Board impermissibly resulted in the taxation of its property at more than its actual value, the Court continued by quoting from its decision in ***Howard County v. State Bd. of Equal.***, 158 Neb. 339, 63 N.W.2d 448 (1954), as follows:

> [A]ny taxpayer who deemed his property not fairly assessed with respect to other property in the county was privileged to resort to the county board of equalization for correction of such inequity. If the taxpayer failed to avail himself of such a remedy, then he had no ground for complaint of the subsequent action of the State Board in raising or lowering valuations of the county even though the result thereof might be the assessment of his individual property on a basis in excess of actual value.

164 Neb. at 840-41, 83 N.W.2d at 575.

The Court concluded by stating that "[i]n this state, overvaluation is an irregularity only which must be appealed to the courts if relief is desired, except where it involves a void, a willfully discriminatory, or a fraudulent assessment in which event a collateral attack may properly be made." *Id.* at 841. 83 N.W.2d at 575.

With respect to the question of due process in this context, the Nebraska Supreme Court's decision in ***Howard County v. State Bd.***

of Equal., 158 Neb. 339, 63 N.W.2d 441 (1954), is also instructive. In ***Howard County***, the State Board had ordered increases in various classes of property in Howard County to achieve statewide equalization. On appeal of the Board's order, the County argued, in part, that the Board's action resulted in taxpayers in the County "bearing an unjust and unlawful burden in their share of state taxes", and that this deprived them of their property without due process of law in violation of Neb. Const. art. I, § 3. *Id.* at 348, 63 N.W.2d at 447.[8] The Court in ***Howard County*** stated "that it is not the function of the State Board to deal with assessments of individuals either directly or indirectly or as a board of review; that is the function of the county board of equalization", and that "[t]he question of due process with respect to individual taxpayers is not involved in the process of equalization between the counties as performed by the State Board." *Id.* at 349, 63 N.W.2d at 447. Quoting from its earlier decision in ***Hacker v. Howe***, 72 Neb. 385, 101 N.W. 255 (1904), the Court in ***Howard County*** noted the unique functions performed by equalization bodies:

> These are special officers and tribunals (persons and boards connected with the equalization of property for tax purposes) within themselves empowered to do and perform all acts necessary and essential in the accomplishment of the public revenues. Due process of law is observed if in the different steps taken by the officers and tribunals created by statute an opportunity is given to an individual taxpayer who may feel aggrieved to be heard with reference thereto, and power is given to redress such grievance as may be right and just. Personal notice is not always essential. Notice given by statute or by publication may be sufficient. An owner is not deprived of his property without due process of law if he has an opportunity to question its validity* * *.

158 Neb. at 349, 63 N.W.2d at 447-48.

The Court continued by reiterating that its decision in ***Hacker v. Howe*** mandated that "any taxpayer who deemed his property not fairly assessed with respect to other property in the county was privileged to resort to the county board of equalization for correction of such inequity." 164 Neb. at 349, 63 N.W.2d at 448. "If the taxpayer failed to avail himself of such a remedy", however, the Court stated "he had no ground for complaint of the

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[8] At the time ***Howard County*** was decided, there was a state property tax. The State is now prohibited from levying property taxes for state purposes. Neb. Const. art. VIII, § 1A.

subsequent action of the State Board in raising or lowering valuations of the county even though the result thereof might be the assessment of his individual property on a basis in excess of actual value." *Id.* at 349-50, 63 N.W.2d at 448. It noted that this was based on the principle "that there is an inherent distinction between boards of equalization and courts of law. Although the actions of the board of equalization are quasi judicial in character, due process is not involved in the same manner as is true with respect to proceedings in court." *Id.* at 350, 63 N.W.2d at 448.

IV. Conclusion as to the Board's Authority.

In sum, the above discussion demonstrates that the Board itself has no jurisdiction to rescind or modify its prior equalization order increasing residential property valuations for Douglas County. Nor may the Board make a motion or take any other action affecting the 1994 valuations for Douglas County resulting from its order. The recent Nebraska Supreme Court decision in ***Adams County***, where the Court held that the Board had no jurisdiction to revisit its equalization orders after the time for appeal had passed, compels this conclusion. The Board's power to act as to any tax year ends at this point. This is also consistent with the statutory provisions outlining the Board's authority. The statutes contemplate that the Board, in exercising its statewide equalization power, does so on an annual basis. It meets annually for this purpose, and must complete its action by August 15. Counties, municipalities, or persons aggrieved by Board action must timely prosecute an appeal to obtain judicial review of a Board order. Absent an appeal pursuant to § 77-510, there is no mechanism for review or alteration of a Board order. A limited judicially recognized exception to the rule establishing the finality of Board orders exists where the action of the Board is fraudulent or beyond its authority. Neither ground for application of this exception allowing collateral attack of Board action appears to be present in this case. In any event, it is clear that the Board itself now has no power to rescind or modify its prior order, or to take any other action relating to 1994 property valuations affected by that order. If the order of the Board at issue is to be changed, the only available means is through a court action instituted by an affected taxpayer or taxpayers.

V. Preservation of the Rights of Individual Taxpayers.

As a result of the conclusions that we are legally compelled to reach based on the State Constitution, Nebraska statutes, and case law defining the powers of the State Board, it is inevitable that some will question the ultimate fairness or justice of the

absence of a legal remedy to challenge the Board's action in increasing residential property values in Douglas County last August. While the foregoing discussion will likely provide little or no comfort to taxpayers in Douglas County who feel wronged by the situation they are presently facing, we feel compelled to attempt to explain the process involved in the assessment of property taxes, in the hope that such a discussion will better advise individuals of the respective duties of the State Board and county boards of equalization, and their rights and remedies in these circumstances in the future.

While the Nebraska Supreme Court has often discussed the authority of the Board, perhaps the most extensive discussion of these principles is contained in ***Carpenter v. State Bd. of Equal.***, 178 Neb. 611, 134 N.W.2d 272 (1965) ["***Carpenter***"]. Discussing the respective duties of the State Board and the various county boards of equalization, the Court in ***Carpenter*** stated:

> In our scheme of taxation, the Board acts upon the abstracts of tax assessments furnished by each of the counties. The original determination of actual value under the statutory standard is the function of the county board of equalization. The determination of each individual county as to actual value within the county is clothed with a presumption of validity and, in the absence of evidence to the contrary, may be accepted by the Board as conforming to the law. It is fundamental that the Board has no power to readjust individual valuations within the county. It can only act to equalize the assessments between different counties in order to achieve the constitutional objective of uniform and proportionate valuations over the whole state. As we see it, the primary duty of the Board is to establish uniformity between the various counties.

Id. at 616, 134 N.W.2d at 276 (emphasis added). ***See also AT&T Information Sys. v. State Bd. of Equal.***, 237 Neb. 591, 595, 467 N.W.2d 55, 58 (1991) (noting that, in reviewing abstracts of assessments submitted by the counties, Board "deals only with the values of taxable property of a county in the aggregate.").

The Court in ***Carpenter*** continued its discussion of "[t]he proper relationship and the distinction in powers between the county boards of equalization and the Board" by quoting at length the following passage from its decision in ***S.S. Kresge Co. v. Jensen***, 164 Neb. 833, 83 N.W.2d 569 (1957):

> `It is the function of the county board of equalization to determine the actual value of the property for taxation purposes. While the county board of equalization acts in a quasi-judicial capacity and its valuations are final as to individual taxpayers unless appealed from, such valuations are subject to the powers of the State Board of Equalization and Assessment, which powers have been described by this court as being purely incidental to proper equalization of the assessment of the different counties of the state as returned by that body. Hacker v. Howe, 72 Neb. 385, 101 N.W. 255. Both the county board of equalization and the State Board of Equalization and Assessment, however, must give effect to the constitutional requirement that taxes must be levied uniformly and proportionately upon all tangible property. It is evident that actual value and a uniform and proportionate value may not always result in identical results. In dealing with such a situation in this state, the Supreme Court of the United States said: `This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by the law, the latter requirement is to be preferred as the just and ultimate purpose of the law.' Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A.L.R. 979.

178 Neb. at 616-17, 134 N.W.2d at 276-77 (emphasis in original).

Perhaps the seminal statement of the respective powers of the State Board and the county boards of equalization is contained in the Court's decision in ***Hacker v. Howe,*** 72 Neb. 385, 101 N.W. 255 (1904). ***Hacker*** involved a collateral attack on the validity of a State Board order increasing by a percent the value of property in Nemaha County. The plaintiff argued, in part, that the Board's order was unlawful because it resulted in the assessment of property in excess of its value. While stating that the plaintiff was not in a position to challenge the order on this basis, the Court's discussion of the issue is nevertheless worth noting:

> [I]t is manifest that the state board of equalization is powerless to deal with particular items or property returned for taxation and included in the abstracts of assessment on which the board acts. The law provides

> that the board may equalize only by increasing or decreasing by a per centum of the aggregate valuation of all the property in the county affected by the order. . . . The state board does not deal with individual assessments, but with the property of a county as a whole,. . . . Individual discrepancies and inequalities the law contemplates shall be corrected and equalized by the county authorities, and a taxpayer failing to avail himself of the opportunity thus presented has no legal ground of complaint because of the action of the state board of equalization in lowering or raising the valuation of all property in the county so as to conform with all other property throughout the state. The county board is especially empowered to hear complaints and grievances as between individual taxpayers, and to adjust and remedy the same as may seem just and equitable. The state board possesses no such power. The taxpayer. . .could, if he felt aggrieved, complain that his property was assessed too high as compared with all other property. He had the right to insist that all property be valued on the same basis, and just ground of complaint if such was not done.. . . Not having done so, he is presumed to have been satisfied, and the state board was warranted in assuming that all property in the county, of whatsoever kind, had been assessed on the same basis of valuation, and to equalize accordingly.. . .That tribunal was not bound to and did not take into consideration inequalities as between individual taxpayers, and could not, under the law, do so, had it been inclined.. . . .

Id. at 400-01, 101 N.W. at 261 (emphasis added) (citations omitted).

Under Nebraska law, a clear distinction exists between the functions and duties of county boards of equalization and the State Board. County boards of equalization deal with the establishment of values of individual properties, and are responsible for ensuring that such values are uniform within the county. The State Board has no power to adjust individual valuations of property within a county, but can act only to equalize valuations of property in the counties in the aggregate to achieve statewide equalization. The State Board, in ordering an increase in the values of residential properties in Douglas County by a percentage, acted pursuant to its authority and duty to achieve intercounty or

statewide equalization.[9] In the instant case, we presume that it would not have done so absent evidence that the increase ordered was necessary to achieve intercounty equalization.

The lesson to be learned from the Board's action is this: For individual taxpayers in a county in which similarly situated property is not valued at full market value, it is incumbent on the individual taxpayer to seek redress for the overvaluation of their individual property in comparison with the value of other similar property in the county at the county level. Even if the taxpayer believes his or her property is being valued by the county assessor at its "actual" or "fair market value", if other similar property is not being assessed at its "actual value", the taxpayer is not, under Nebraska law, entitled to challenge his or her individual valuation after a State Board mandated increase applied to a class or subclass of property, even if that results in the assessment of their property at more than "actual value." Under present Nebraska law, these individual discrepancies must be addressed at the county level.[10] Thus, it is imperative that individual taxpayers not only be concerned with the question of whether their own properties are being valued at actual value; in addition, they must be cognizant of whether their county assessor is valuing all similar properties at the same level of value. If the assessor is failing to do so, and the taxpayer does not protest their individual property value to the county board of equalization, and appeal this decision if no relief is provided, they may again be subjected to a State Board ordered adjustment of their value as part of the Board's exercise of its statewide equalization power.

V. Conclusion.

The court decisions in the property tax area underscore the importance of doing the job right the first time. The courts, under existing law, do not give the Board a second chance. This is a very important factor for the Board to consider as it prepares to equalize values for 1995. Act carefully and thoughtfully.

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[9] This is not to say that the State Board must necessarily disregard the impact on individual taxpayers of its exercise of its intercounty or statewide power. *See* Op. Att'y Gen. No. 94053 (July 13, 1994).

[10] There is a bill pending in the Legislature, LB 452, which would allow taxpayers the right to protest the value of their individual property to the county board of equalization after the State Board has made percentage changes to classes or subclasses of property within a county.

The Nebraska Supreme Court has made it very clear that the State Board will not be allowed to rescind or modify the order it entered last August increasing residential property values in Douglas County. Nor will the Court uphold any motion or other action by the Board to affect the 1994 valuations of residential property subjected to the order at this time. The time for appeal of that decision has long passed. Neither the county, any municipality, nor any person affected appealed that action. It now would be subject only to collateral attack by an affected taxpayer, and such an action would most likely be unsuccessful.

We would respectfully suggest that the Board develop and propose legislation to remedy any legal defects the Board perceives in the current equalization process and to make our property tax system as fair as possible to the taxpayers.

Very truly yours,

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