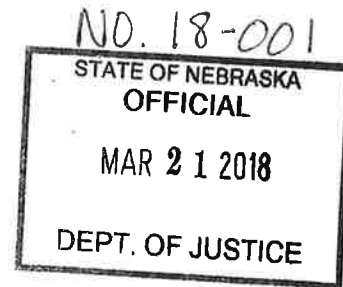




STATE OF NEBRASKA  
**Office of the Attorney General**

2115 STATE CAPITOL BUILDING  
LINCOLN, NE 68509-8920  
(402) 471-2682  
TDD (402) 471-2682  
FAX (402) 471-3297 or (402) 471-4725



**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL

**SUBJECT:** Constitutionality of the Refundable Income Tax Credits in LB 829 and LB 947.

**REQUESTED BY:** Senator John Kuehn  
Nebraska Legislature

**WRITTEN BY:** Douglas J. Peterson, Attorney General  
L. Jay Bartel, Assistant Attorney General

### INTRODUCTION

You have requested our opinion regarding the constitutionality of two bills which would provide a refundable income tax credit based on a percentage of property taxes paid during the taxable year. The first bill (LB 829) provides "each taxpayer a refundable credit against the income tax imposed by the Nebraska Revenue Act of 1967 in the amount of fifty percent of the school district taxes levied on the taxpayer's property and paid by the taxpayer during such taxable year." LB 829, § 3. The second bill (LB 947) provides "each resident individual who is an owner of a homestead shall be allowed a refundable credit against the income tax imposed by the Nebraska Revenue Act of 1967 equal to a percentage of the property taxes paid during the taxable year on such homestead . . . ." LB 947, § 3(1). "For taxable year 2018, the refundable credit shall be ten percent of the property taxes paid during the taxable year." *Id.* The amount of the credit is capped at \$230 for 2018. LB 947, § 3(2). The bill provides a mechanism for the credit to increase in subsequent years by a percentage not to exceed 30 percent, and for the cap to increase by a maximum of \$50 per year, not to exceed \$730. LB 947, §§ 3, 5. LB 947 also provides that "each resident individual shall be allowed a refundable credit

against the income tax imposed by the Nebraska Revenue Act of 1967 equal to a percentage of the property taxes paid during the taxable year on agricultural land and horticultural land, farm sites, and improvements on farm sites that are agricultural or horticultural in nature.” LB 947, § 4. “For taxable year 2018, the refundable credit shall be ten percent of the property taxes paid during the taxable year.” *Id.* A mechanism is provided for the credit to increase in subsequent years by two percentage points a year, not to exceed thirty percent. LB 947, § 5.

You have asked us to address “two issues [raised by these bills] regarding foregoing a state income tax obligation based on property taxes paid.” You phrase these questions as follows:

First, does the payment of property taxes to a local government as a means of foregoing a state income tax liability represent a commutation of taxes, which is prohibited by Article VIII Section 4 of the Nebraska Constitution?

Second, the receipt of a refundable income tax credit based on a proportion of property taxes paid favors only those who file a Nebraska income tax return, not all property tax payers. Is this preferential treatment for Nebraska income tax filers over non-resident property tax payers facially discriminatory on the basis of the Commerce Clause and/or Dormant Commerce Clause of the U.S. Constitution?

## ANALYSIS

### A. Commutation of Taxes.

Neb. Const. art. VIII, § 4, provides, in pertinent part:

Except as to tax and assessment charges against real property remaining delinquent and unpaid for a period of fifteen years or longer, 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, nor shall commutation for such taxes be authorized in any form whatever . . . .

“The proscription against commuting a tax prevents the Legislature from releasing either persons or property from contributing a proportionate share of the tax.” *Sarpy County Farm Bureau v. Learning Community of Douglas and Sarpy Ctys.*, 283 Neb. 212, 244, 808 N.W.2d 598, 621 (2012). In *Steinacher v. Swanson*, 131 Neb. 439, 268 N.W. 317 (1936), the Nebraska Supreme Court held an act which allowed delinquent property taxes to be paid in installments violated the prohibition against the commutation of taxes in art. VIII, § 4. The *Steinacher* court noted the definition of “commutation” expressed in *Woodrough v. Douglas County*, 71 Neb. 354, 361, 98 N.W. 1092, 1095 (1904):

Commutation is a passing from one state to another; an alteration, a change; the act of substituting one thing for another; a substitution of one sort of payment for another, or of a money payment in lieu of a performance of a compulsory duty or labor or of a single payment in lieu of a number of successive payments, usually at a reduced rate. 131 Neb. at 445-46, 268 N.W. at 321.

Further addressing the meaning of the prohibition against the commutation of taxes in art. VIII, § 4, the Court in *Steinacher* stated:

It is quite apparent that the framers of the Constitution of 1875, the one first containing this provision, and the members of all subsequent constitutional conventions, have been imbued with the idea that all taxpayers are entitled to the same treatment by the government they support. For this reason they have expressly written into our Constitution that the legislature not only shall have no power to release or discharge any one from the payment of his share of taxes, but a commutation for taxes in any form whatever is prohibited. From an examination of the definitions of the word "commutation" hereinbefore set out, and the use of the words "in any form whatever," contained in our constitutional provision, it is quite apparent that the legislature is prohibited by the Constitution from changing the method of payment of any tax once levied. Clearly, under this constitutional provision, the legislature cannot reduce the amount of the tax, extend the time for payment, or in any manner change the method of payment. 131 Neb. at 446, 268 N.W. at 321 (emphasis in original).

Thus, the prohibition against "commutation" means that the "legislature is prohibited by the Constitution from changing the method of payment of any tax once levied." *Steinacher v. Swanson*, 131 Neb. at 446, 268 N.W. at 321. See also *Woodrough v. Douglas County* (Act which allowed delinquent taxpayers to pay in installments violated the prohibition against commutation for taxes).

In *Banks v. Heineman*, 286 Neb. 390, 837 N.W.2d 70 (2013), the Court addressed for the first time the issue of whether the prohibition against the "commutation" of taxes applied to taxes other than property taxes. At issue was whether the "nameplate capacity tax," an excise tax measured by the production capacity of wind generation facilities, operated to commute taxes in violation of art. VIII, § 4. The Court noted that "[t]he language of article VIII, § 4, does not prohibit the release, discharge, or commutation of 'taxes,' but, rather, a taxpayer's 'proportionate share' of taxes . . . ." This language "correlates with the requirement of Neb. Const. Art. VIII, § 1, that taxes be levied by valuation uniformly and proportionately"—a provision it previously held "does not apply to an excise tax." *Id.* at 398-99, 837 N.W.2d at 78. "Based on the semantic and historical linkage between the prohibition against commutation of a taxpayer's 'proportionate share' of taxes in article VIII, § 4, and the uniform and proportionate requirements of article VIII, § 1, [the Court] conclude[d] that the scope of the two provisions is the same." *Id.* at 399,

837 N.W.2d at 78. It thus held “that the constitutional prohibition against commutation of taxes set forth in article VIII, § 4, does not apply to an excise tax.” *Id.*

“An excise tax, using the term in its broad meaning as opposed to a property tax, includes taxes sometimes designated by statute or referred to as privilege taxes, license taxes, occupation taxes, and business taxes.” *State v. Galyen*, 221 Neb. 497, 500-01, 378 N.W.2d 182, 185 (1985) (quoting *Licking v. Hays Lumber Co.*, 146 Neb. 240, 243, 19 N.W.2d 148, 150 (1945)); see also *Anderson v. Tiemann*, 182 Neb. 393, 403-04, 155 N.W.2d 322, 329 (1967) (“Franchise tax” imposed under Nebraska Revenue Act of 1967 based on or measured by income of corporation was “an excise tax or privilege tax and not a property tax” and thus could not violate the requirement of uniform and proportionate valuation of tangible property in art. VIII, § 1).

The income tax credits allowed under LB 829 and LB 947 do not, at least directly, fall within the meaning of “commutation” as defined by the Nebraska Supreme Court. The income tax credits, while determined on the basis of a percentage of property taxes paid, do not alter or change the amount of property taxes paid, nor do they substitute one form of payment of property taxes for another. Further, while the income tax is not an “excise” tax, a form of taxation the Court has specifically recognized is not subject to the commutation restriction,<sup>1</sup> it is not a property tax within the meaning of art. VIII, § 1, and thus is not a tax subject to the prohibition against the “commutation” of taxes in art. VIII, § 4.<sup>2</sup>

---

<sup>1</sup> Taxes measured by income have been recognized as falling within two categories: “(1) excise taxes on the privilege of doing, or the license to do, business in the state, owning property, or engaging in other activities within the state; and (2) taxes on net income derived from or attributable to the state.” Hellerstein & Hellerstein, *State Taxation* ¶ 7.01 (3d ed.). “The excise tax is commonly referred to as a ‘franchise tax’ and the tax on net income is commonly referred to as a ‘direct net income’ tax.” *Id.*

<sup>2</sup> In the past, we have questioned whether the provision of income tax credits based on property taxes paid would be an indirect means to improperly exempt property from taxation or violate the constitutional requirement of uniform taxation. Op. Att’y Gen. No. 90007 at 6 (Feb. 14, 1990) (Credit against income tax liability based on real property taxes paid by only certain taxpayers could “be viewed as an unconstitutional attempt to indirectly grant an exemption for real property not authorized by the Constitution.”); Report of Attorney General 1971-72, Opinions No. 102 (Feb. 16, 1972), 104 (Feb. 17, 1972), 106 (Feb. 18, 1972), and 108 (Feb. 24, 1972) (Credit against sales and income taxes based on personal property taxes paid may violate uniformity clause). The Legislature “cannot circumvent an express provision of the Constitution by doing indirectly what the Constitution prohibits it from doing directly.” *Rock County v. Spire*, 235 Neb. 434, 447, 455 N.W.2d 763, 770 (1990). While it is possible a court could view the allowance of an income tax credit based on property taxes paid as an indirect attempt to impermissibly

## B. Commerce Clause.

The Commerce Clause authorizes Congress to “regulate Commerce . . . among the several States.” U.S. Const. art. I, § 8, cl. 3. “Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles in commerce.” *Oregon Waste Systems, Inc. v. Dep’t of Environmental Quality*, 511 U.S. 93, 98 (1994) [*Oregon Waste Systems*]. This “negative command, known as the dormant Commerce Clause, prohibit[s] certain state taxation even when Congress has failed to legislate on the subject.” *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 513 U.S. 175, 179 (1995). Under the four-part test adopted by the Court to govern the validity of state taxes under the Commerce Clause, a tax will be sustained against Commerce Clause challenge “when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.” *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

“[T]he first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it ‘regulates evenhandedly with only “incidental” effects on interstate commerce, or discriminates against interstate commerce.’” *Oregon Waste Systems*, 511 U.S. at 99 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)). “[D]iscrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Systems*, 511 U.S. at 99. “[A] state tax that favors in-state business over out-of-state business for no other reason than the location of the business is prohibited by the Commerce Clause.” *American Trucking Ass’ns, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987). “[T]he degree of a differential burden or charge on interstate commerce ‘measures only the extent of the discrimination’ and ‘is of no relevance to the determination whether a State has discriminated against interstate commerce.’” *Oregon Waste Systems*, 511 U.S. at 100 n.4 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992) (emphasis in original)).

In assessing if a state tax impermissibly discriminates against interstate commerce, a court must consider not only the tax, but also any credits, exemptions, or exclusions. See *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (Invalidating Louisiana tax on use of natural gas in the state in part because allowing credits only to those engaged in in-state economic activity effectively immunized local interests from the tax); see also *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 211 (1994) (Scalia, J., concurring) (“[E]xemption’ from or ‘credit’ against a ‘neutral tax’ . . . no different in principle” than tax that directly discriminates against out-of-state interests). Various tax exemptions or credits have been held to violate the Commerce Clause. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1997) (Invalidating

---

commute property taxes in contravention of art. VIII, § 4, we believe it is unlikely the credit would be found unconstitutional on this ground.

property tax exemption for charitable institutions that was limited to institutions serving principally state residents); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988) (Invalidating Ohio statute that provided tax credit for sales of ethanol produced in-state, but not ethanol produced in certain other states).

"[A] tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 75 (1989). "If a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Oregon Waste Systems*, 511 U.S. at 99. A discriminatory law will be invalidated unless "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 101 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)). "By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'" *Oregon Waste Systems*, 511 U.S. at 99 (quoting *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970)).

You have asked us to address if limiting the refundable income tax credits provided under LB 829 and LB 947 to persons subject to Nebraska income tax creates "preferential treatment for Nebraska income tax filers over non-resident property tax payers [which is] facially discriminatory" in violation of the Commerce Clause. In order to address this issue, it is first necessary to summarize the scope of Nebraska's income tax, and the nature of the refundable credits allowed under each bill.

1. Nebraska's Income Tax.

Both resident and nonresident individuals are subject to Nebraska income tax. See Neb. Rev. Stat. § 77-2715(1) (Cum. Supp. 2016). Resident individuals are taxed on their "entire net income," while nonresident individuals are taxed on income "derived from sources within" Nebraska. *Id.* Both resident and nonresident estates and trusts, and their beneficiaries, are subject to Nebraska income tax. Neb. Rev. Stat. § 77-2717(1)(b), (4)-(6) (Cum. Supp. 2016). Corporations are also subject to income tax. Neb. Rev. Stat. § 77-2734.02(1) (Cum. Supp. 2016).<sup>3</sup> Nebraska income tax also applies to resident and nonresident partners of partnerships, as well as resident and nonresident shareholders of Subchapter S corporations or members of limited liability companies. Neb. Rev. Stat. §§ 77-2727 (Cum. Supp. 2016) and 77-2734.01 (Cum. Supp. 2016).

2. LB 829.

Under LB 829, a refundable income tax credit is allowed "to each taxpayer...in the amount of fifty percent of the school district taxes levied on the taxpayer's property and

---

<sup>3</sup> Corporations operating as a unitary business both within and outside Nebraska determine taxable income by use of an apportionment formula. Neb. Rev. Stat. §§ 77-2734.05 and 77-2734.06 (2009).

paid by the taxpayer during [the] taxable year.” LB 829, § 3. While “taxpayer” is not defined, it presumably refers to all taxpayers subject to Nebraska income tax. As noted, “taxpayers” subject to Nebraska income tax can include both resident and nonresident individuals and entities. LB 829 specifically extends the refundable income tax credit to “resident individuals,” “resident estates and trusts,” “nonresident estates and trusts,” resident or nonresident “beneficiaries” of estates and trusts, and “corporate taxpayers.” LB 829, §§ 5, 6, and 7. Nevertheless, by stating “each taxpayer” is entitled to the credit, we interpret the bill to extend the credit to any taxpayer subject to the Nebraska income tax, resident or nonresident.

3. LB 947.

The refundable income tax credit provided under LB 947 is limited to two classes of resident taxpayers: (1) Resident individual homestead owners; and (2) Resident individuals paying property taxes on agricultural land and horticultural land, farm sites, and improvements that are agricultural or horticultural in nature. LB 947, §§ 3, 4. If property taxes are paid by pass-through entities (S-Corps, partnerships, LLCs, trusts, or estates), property taxes paid are allocated to shareholders, partners, members, or beneficiaries in the same proportion that income is distributed. *Id.* On its face, LB 947 would thus not provide an income tax credit to nonresident owners of either of these two classes of property.

**C. Do the Limitations on Availability of the Income Tax Credits Allowed Under LB 829 and LB 947 Result in Discrimination Prohibited by the Commerce Clause?**

LB 829, on its face, provides “each taxpayer” a refundable income tax credit of a percentage of school district property taxes levied and paid by the taxpayer. Both residents and nonresidents can be subject to Nebraska income tax. To the extent the credit is extended to any person or entity subject to Nebraska income tax, the bill does not discriminate between resident and nonresident taxpayers. Availability of the credit is based on whether the person or entity is subject to Nebraska income tax and pays property tax in Nebraska, not residency. Thus, the bill does not discriminate on its face against nonresidents subject to Nebraska income tax.

Limiting the credit to taxpayers, however, results in different treatment of some nonresidents. In this regard, nonresidents who do not have income sourced to Nebraska and are thus not subject to income tax, but own property on which taxes are paid, would receive no income tax credit. While this may not impact a significant number of nonresidents, there is no “de minimis” defense to a charge of discriminatory taxation under the Commerce Clause.” *Fulton Corp. v. Faulkner*, 516 U.S. 325, 334 n.3 (1996). The income tax credit is intended to provide tax relief to property taxpayers. By allowing the credit only to those subject to income tax, some property taxpayers (nonresidents that pay property taxes but are not subject to income tax) are denied relief. This discrimination against certain nonresidents would disfavor primarily out-of-state interests, which the Commerce Clause prohibits absent a showing that limiting the credit advances a

legitimate local interest that cannot adequately be served by nondiscriminatory alternatives. Accordingly, to remove any potential impermissible discrimination, the credit should be extended to all property taxpayers, resident and nonresident, whether or not they are subject to Nebraska income tax. As the credit is refundable, a mechanism should be created to allow the credit to be claimed by those not otherwise subject to Nebraska income tax.

LB 947, in contrast to LB 829, specifically limits the income tax credits to two classes of residents subject to Nebraska individual income tax, either as owners of a homestead or agricultural and horticultural land, farm sites, and improvements. The Commerce Clause implications of each classification are addressed separately below.

1. Homestead Credit.

LB 947 allows an income tax credit to “each resident individual who is an owner of a homestead...” LB 947, § 3(1). “Homestead has the same meaning as in § 77-3502.” LB 947, § 2(4). The definition of “homestead” in § 77-3502, utilized for determining qualification for the homestead property tax exemption, generally means a residence occupied by an owner from January 1 through August 15 in each year. Neb. Rev. Stat. § 77-3502 (2009).

In *Reinish v. Clark*, 765 So. 2d 197 (Fla. Dist. Ct. App. 2000), nonresident taxpayers challenged Florida’s homestead tax exemption on several grounds, including a claim that the exemption violated the Commerce Clause. The taxpayers argued that they were “engaged in direct economic competition with Florida residents for the purchase of real estate,” and that “the challenged exemption afford[ed] those persons who establish a Florida permanent residence a clear and continuing economic advantage over non-residents.” *Id.* at 213. The court found that the exemption was not “*per se* discriminatory against interstate commerce,” and that it could “discern neither a discriminatory purpose underlying the exemption nor an improper discriminatory effect on non-residents.” *Id.* at 214. It concluded:

[T]he Florida homestead tax exemption neither distinguishes between Florida residents and non-residents nor disparately treats identically situated persons. The focus of the exemption is on the use of the property itself, and not on the user. Entitlement to the exemption hinges upon whether the property is used as the “permanent residence.” We cannot find any reasonable basis to support the [taxpayers’] claim that the exemption discriminates against interstate commerce. The historical justification of the homestead tax exemption is the protection of the home, a legitimate governmental purpose. *Id.*

Determining there was “no facial discrimination against interstate commerce,” the *Reinish* court “look[ed] to the second stage of the analysis under the [Commerce] Clause to determine whether the Florida homestead tax exemption impose[d] a burden on interstate commerce that clearly outweigh[ed] its potential benefits.” *Id.* at 215. The court



conclude[d] that the Florida exemption [was] an even-handed regulation that promotes the legitimate, strong public interest in promoting the stability and continuity of the primary permanent home. The [taxpayers] have not shown either that the effects of the exemption on interstate commerce are anything more than incidental, or that the burden imposed on such commerce is clearly excessive when compared to the asserted local benefits. Under these circumstances, the Court's criteria in *Pike* for upholding the regulation are met. *Id.*

Relying on *Reinisch*, a Florida District Court of Appeal found that a cap on increases in the assessment of homestead property did not violate the Commerce Clause. *Lanning v. Pilcher*, 16 So. 3d 294 (Fla. Dist. Ct. App. 2009), *rev. denied*, 37 So. 3d 847 (Fla. 2010), *cert. denied*, 562 U.S. 1062 (2010). The court again reasoned that "the tax is based on the way the property is used, not on the status of the landowner as a resident or nonresident." 16 So. 3d at 297. *See also Stahl v. Village of Hoffman Estates*, 296 Ill. App. 3d 550, 230 Ill. Dec. 824, 694 N.E.2d 1102 (Ill. 1998) (Transfer tax exemption granted only sellers of property who purchased another residence in village did not violate the Commerce Clause).

These authorities demonstrate that a homestead exemption based on ownership and use of the property as a permanent or primary residence, as opposed to the status of the owner as a resident or nonresident, does not violate the Commerce Clause. LB 947 incorporates the definition of "homestead" in § 77-3502, which means a residence actually occupied by the owner for a specified period during the year. Like an exemption, an income tax credit based on status as an owner of a homestead, as opposed to resident or nonresident status, would not result in discriminatory treatment which would violate the Commerce Clause. The concern is that LB 947 also limits availability of the credit to "each resident individual" homestead owner. This language thus conditions eligibility to claim the credit on residency, evincing an intent to discriminate against nonresidents. Facial discrimination of this type is prohibited by the Commerce Clause. If, however, the bill is amended to provide the credit is based on ownership and occupancy of property as a homestead regardless of residency, it will satisfy any objection that it discriminates against interstate commerce.

## 2. Agricultural and Horticultural Land Credit.

LB 947 allows an income tax credit to "each resident individual" based on a percentage of property taxes paid "on agricultural land and horticultural land, farm sites, and improvements on farm sites that are agricultural or horticultural in nature." LB 947, § 4. The credit is thus limited to "resident individuals" that pay property taxes on agricultural and horticultural land, farm sites, and improvements. Nonresidents, of course, can also be subject to Nebraska income tax on income sourced to Nebraska. By limiting the income tax credit to "resident individuals," the credit is necessarily denied to nonresidents paying taxes on agricultural and horticultural land, including nonresidents that are subject to Nebraska income tax.

In *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1997), the Supreme Court considered whether a statute that provided a general exemption for property owned by charitable institutions violated the Commerce Clause because it provided a lesser exemption to institutions “conducted or operated principally for the benefit of persons who are not residents of Maine . . . .” *Id.* at 568. In striking down the limitation on the exemption for institutions serving primarily nonresidents, the Court noted it had “held that special fees assessed on nonresidents directly by the State when they attempt to use local services impose an impermissible burden on interstate commerce.” *Id.* at 578 (citing *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992)). While the Maine statute involved a tax exemption statute, not a tax imposition statute, the Court found the fact “[t]hat the tax discrimination comes in the form of a deprivation of a generally available tax benefit, rather than a specific penalty on the activity itself, is of no moment.” *Id.* at 578-79. The Court found that “[g]iven the fact that the burden of Maine’s facially discriminatory tax scheme falls by design in a predictably disproportionate way on out-of-staters, the pernicious effect on interstate commerce is the same as in our cases targeting out-of-staters alone.” *Id.* at 579. Because the statute “facially discriminate[d] against interstate commerce,” it was “all but *per se* invalid.” *Id.* at 581. Invalidating the statute, the Court noted the Town “made no effort to defend the statute under the *per se* rule” by advancing a legitimate local purpose that could not be adequately served by reasonable nondiscriminatory alternatives. *Id.* at 581-82.

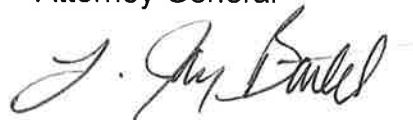
Limiting the income tax credit to resident individuals paying property taxes on agricultural and horticultural land, farm sites, and improvements in Nebraska necessarily places nonresidents subject to Nebraska income tax that pay property taxes on the same type of property at an economic disadvantage. The credit is facially discriminatory—it is only allowed to resident individuals subject to Nebraska income tax. Nonresidents (presumably primarily persons from out-of-state) that pay property taxes on agricultural property and are subject to Nebraska income tax do not receive the credit. A facially discriminatory statute favoring in-state actors over out-of-state actors is *per se* invalid, and can be defended only by demonstrating “that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Oregon Waste Systems*, 511 U.S. at 101 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)). We are unaware of any purpose for allowing only residents to claim the income tax credit other than to limit tax relief based on taxes paid on agricultural property to Nebraska residents. This is precisely the type of discrimination favoring in-state economic interests over out-of-state interests that the dormant Commerce Clause forbids. Accordingly, restricting the credit to “resident individuals” is not permissible under the Commerce Clause. The improper discrimination can, of course, be eliminated by extending the credit to all persons, both resident and nonresident, based on their payment of property taxes on agricultural property. Further, like LB 829, to remove any potential impermissible discrimination against all nonresidents, the credit should be extended to all property taxpayers, resident and nonresident, whether or not they are subject to Nebraska income tax. As the credit is refundable, a mechanism can be created to allow the credit to be claimed by those not otherwise subject to Nebraska income tax in order to provide property tax relief to all persons paying taxes on agricultural property.

## CONCLUSION

In sum, we conclude that the refundable income tax credits provided under LB 829 and LB 947 would not, if enacted, impermissibly commute taxes in violation of Neb. Const. art. VIII, § 4. The income tax credits, while determined on the basis of a percentage of property taxes paid, do not alter or change the amount of property taxes paid, nor do they substitute one form of payment of property taxes for another. Further, the prohibition against "commutation" applies only to property taxes. As the income tax is not a property tax, the prohibition against the "commutation" of taxes in art. VIII, § 4 does not apply. Further, while the income tax credits allowed under both LB 829 and LB 947 are limited in such a manner as to raise questions as to their constitutionality under the Commerce Clause, both bills can be amended to remedy the discriminatory treatment against nonresidents contained in the bills as currently proposed. This can be done by allowing the credit to all taxpayers paying taxes on qualifying property, resident and nonresident, regardless of whether they are subject to Nebraska income tax.

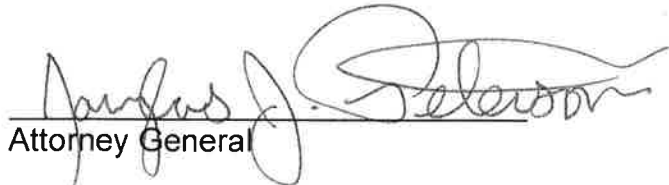
Very truly yours,

DOUGLAS J. PETERSON  
Attorney General



L. Jay Bartel  
Assistant Attorney General

Approved by:



Attorney General

pc Patrick J. O'Donnell  
Clerk of the Nebraska Legislature