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#92101

DATE: August 14, 1992

SUBJECT: Refund of Personal Property Taxes for 1992 Collected Under Accelerated Payment Statute.

REQUESTED BY: Paul Wood, Red Willow County Attorney

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

You have requested our opinion on several questions pertaining to the authority of the county to refund personal property taxes for tax year 1992 collected under the "accelerated payment" provisions of Neb.Rev.Stat. § 77-1214 (Reissue 1990). In addition, you have asked our opinion on certain other property tax related issues.

Your initial series of questions relates to the authority of the county to grant refunds of personal property taxes for 1992 collected under the "accelerated payment" statute. As you note, collections of personal property taxes were made prior to the enactment of 1992 Neb. Laws, L.B. 1063 and the electorate's approval of Amendment 1, the constitutional amendment altering Neb. Const. art. VIII, §§ 1 and 2, pertaining to property taxation. Your first question is whether refunds of accelerated personal property taxes may be granted to taxpayers applying for refunds in cases involving nonincome-producing personal property.

The answer to this question is provided by reference to 1992 Neb. Laws, L.B. 719A, § 174, which amended Neb.Rev.Stat. § 77-1734.01 (Supp. 1991) to add a new subsection (2), which provides as follows:

> (2) A taxpayer who paid taxes upon personal property for tax year 1992 as a result of the acceleration of the due date pursuant to section 77-1214 shall be eligible to claim a refund or credit of any taxes paid which are in excess of the amount which subsequently would have been due for tax year 1992. The claim for a refund or credit pursuant to this subsection shall be made in writing to the country treasurer to whom the tax was paid within two years from the date the tax was due. Before the refund or credit may be made, the county treasurer shall receive verification from the county assessor that the taxpayer is entitled to the refund or credit, and the claim shall be submitted to the county board. The county board shall pass upon the claim as any other claim made against the county. The refund or credit shall be made in the manner prescribed in section 77-1736.06.

Thus, in response to your initial question, § 174 of L.B. 719A provides a statutory procedure authorizing counties to grant refund claims for taxes collected under the accelerated payment provisions of § 77-1214. Therefore, pursuant to this procedure, refunds may be made in instances where compliance with the statute is satisfied.

Your second question is essentially the same as your first question, with the exception that you ask whether refunds of accelerated taxes on income-producing personal property may be made. In connection with this request, you also ask whether, if refunds may be made, "is the amount of the refund the difference between the tax on the actual value and the tax on the depreciated value called for in LB 1063 and Amendment 1?"

Again, the provisions of § 174 of L.B. 719A address your question. First, it is irrelevant whether the personal property in question is nonincome-producing or income-producing, as the statute draws no such distinction and is applicable to any taxes upon personal property subjected to accelerated payment for tax year 1992. Second, § 174 of L.B. 719A specifically refers to refunding or crediting "any taxes paid which are in excess of the amount which subsequently would have been due for tax year 1992." Thus, the provision is intended to cover situations where a difference exists between the amount of taxes paid based on "actual value" under the accelerated payment statute, and the amount of taxes determined to be due on "depreciable tangible personal property" as defined in § 48 of L.B. 1063. Accordingly, refunds or credits applied for based on the excess of amounts paid under the

accelerated payment statute and the actual amount of tax due for 1992 may be made under the terms of § 174 of L.B. 719A.

Your third and fourth questions pertain to situations where, prior to the enactment of L.B. 1063 and approval of Amendment 1, "the tax was accelerated for 1992 and the tax was not paid." You ask whether the county should issue distress warrants, or whether the County Board may "delete this tax from the tax rolls by correction?" In the event we determine the County Board cannot act in this manner, you then ask if distress warrants should be issued, with taxpayers being permitted to then apply for and receive a refund after collection of the tax.

Neb.Rev.Stat. § 77-1613.02 (Reissue 1990) provides, in pertinent part:

> The county assessor of any county, or the county clerk in those counties having unit tax ledgers which are prepared by the county clerk, may correct the tax list before the tax is paid, in case of clerical errors, and the county assessor of any county, or the county clerk in those counties having unit tax ledgers which are prepared by the county clerk, with the approval of the county board of any county, may correct the tax list before the tax is paid in case of erroneous assessments.

In this situation, we believe that the authority of a county board to approve the correction of "erroneous assessments," "before the tax is paid," is adequate to permit correction of the tax lists to remove personal property taxes which, while originally deemed due for 1992 under the accelerated payment statute, are no longer due as a result of subsequent legislative action for tax year 1992. An assessment on property upon which no tax is due appears to qualify as an "erroneous assessment" within the meaning of § 77-1613.02. Thus, the county board may correct the tax list under the circumstances, and, therefore, distress warrants should not be issued if the provisions of § 77-1613.02 are followed.

You have also asked us to consider each of the previous questions under two scenarios, one being the meeting of the Legislature in special session and the reenactment of L.B. 1063, and the other being the absence of a special session permitting reenactment of L.B. 1063. We find it unnecessary to address this request, as the Legislature was called into special session and enacted L.B. 1, which substantially reenacts L.B. 1063. L.B. 1 was enacted with an emergency clause and signed by the Governor. Nothing contained in L.B. 1 alters our conclusions expressed herein.

Your final question concerns the taxation of "mobile homes." You indicate it is the county treasurer's understanding that "mobile homes" are defined as real estate under L.B. 1063, and ask if this is correct. You also ask what should be done regarding the assessment and collection of taxes on mobile homes for tax year 1992.

Section 44 of L.B. 1063 provides, in pertinent part:

Real property shall mean:

. . . .

(3) Mobile homes, cabin trailers, and similar property whether or not permanently attached to the land, but not intended for highway use, which are used or intended to be used for residential, office, commercial, agricultural, or other similar purposes and which are connected to water, gas, sewer, or other utilities. . . .

Thus, pursuant to § 44 of L.B. 1063, mobile homes are defined as "real property" for property tax purposes. In actuality, this definition of "real property," including mobile homes, was also in effect for tax year 1991 under 1991 Neb. Laws, L.B. 829, § 5. The inclusion of "mobile homes" in the definition of "real property" was sustained as constitutional against a challenge that the enactment of L.B. 829, § 5, resulted in an impermissible commutation of a tax in violation of Neb. Const. art. VIII, § 4. Jaksha v. State, 241 Neb. 106, 129-31, ___ N.W.2d ___, ___ (1991). Thus, "mobile homes" falling within this definition are "real property" for tax year 1992.

With respect to the assessment and collection of taxes on "mobile homes," however, while being defined as "real property" if falling within the provisions set forth is § 77-103(3), taxes on such items are assessed and collected "within the framework of the personal property tax structure." Nebr. Dept. of Revenue Property Tax Directive 91-4 (August 22, 1991); Nebr. Dept. of Revenue Property Tax Directive 91-6 (October 23, 1991); See Neb.Rev.Stat. § 77-1209 to 77-1209.4 (Reissue 1990) (amended, 1992 Neb. Laws, L.B. 1063, §§ 111-113). Thus, while defined as real property,

"mobile homes" are, for administrative purposes, subject to assessment and collection for property tax purposes as personal property.

Very truly yours,

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APPROVED BY:

DON STENBERG, Attorney General

7-420-7.14