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July 30, 2002

Jay Holmquist, General Manager
Nebraska Rural Electric Association
P.O. Box 82048
Lincoln, NE 68501

Re: In lieu of taxes

Dear Jay:

Several Public Power Districts ("PPDs") have purchased and received property and facilities from Nebraska Public Power District ("NPPD") in a series of transactions involving realignment between NPPDs wholesale and retail operations. NPPD has over the years paid the "in lieu of tax" pursuant to *Neb. Rev. Stat.* § 70-651.01 on certain of its property and facilities and now requests that the purchasing PPDs take over NPPD's obligation as a result of the purchase and transfer.

Neb. Rev. Stat. § 70-651.01 provides in pertinent part as follows:

"Every public power district . . . owning property with respect to which it made payments in lieu of taxes in the 1957 calendar year, shall, so long as it continues to own such property, continue to pay annually the same amounts in the same manner . . ."

(Emphasis added.) You ask whether the purchasing PPDs have the obligation to pay the in lieu tax under *Neb. Rev. Stat.* § 70-651.01, in light of the language "so long as it continues to own such property."

At first glance, it would appear that once NPPD no longer owns the property, that the obligation to pay the in lieu of taxes would cease and therefore the purchasing PPDs would have no obligation to continue to make the in lieu of tax payments. However, this is not the case.

In lieu of tax payments are required to be made by the Nebraska Constitution. Art. 8, § 11 provides in pertinent part:

“Every public corporation and political subdivision organized primarily to provide electricity or irrigation and electricity shall annually make the same payments in lieu of taxes as it made in 1957, which payments shall be allocated in the same proportion to the same public bodies or their successors as they were in 1957.”

You will note that there is no mention in the constitutional language about the obligation to pay the tax continuing only so long as the property is owned (time limitation). This omission of the time limitation in the constitution raises the question of whether the time limitation in the statute is valid.

This question was addressed in an Attorney General’s opinion in 1959 (No. 118, Aug. 14, 1959). In that opinion the Attorney General stated:

“Where a statutory provision is repugnant to the constitution it is of no force and effect and the constitutional provision must prevail. (Citations omitted). The constitutional provision clearly provides an annual obligation based on the 1957 payment, without reference to termination, and a statutory provision eliminating this obligation on transfer of the property is, in our opinion, ineffective.”

See also, *State ex rel. Bottcher v. Bartling*, 149 Neb.491, 31 N.W.2d 422 (1948); *School Dist. No. 39 of Washington County v. Decker*, 159 Neb. 693, 68 N.W.2d. 354 (1955); *Midwest Popcorn Co. v. Johnson*, 152 Neb. 867, 43 N.W.2d 174 (1950); *Scott v. Flowers*, 61 Neb. 620, 85 N.W. 857 (1901); *State of Nebraska v. Holcomb*, 46 Neb. 88, 64 N.W. 437 (1895).

I agree with the Attorney General’s opinion. Nevertheless, there is another reason which makes the PPDs responsible for the in lieu of tax payments. There exists in the purchase agreement between NPPD and the PPDs a contractual provision which makes the PPDs liable for the in lieu of tax payments. In Article XIV of the purchase agreement, it provides in pertinent part:

“ . . . [PPD] shall indemnify and hold harmless NPPD against any payment of taxes, in lieu of taxes or other special assessments in connection with such facilities, or services from said facilities, which payments properly accrue after the Date of Operational Transfer.”


It is my understanding that the above indemnity is in all of the purchase agreements with PPDs. Therefore, it is my opinion that a PPD is responsible for the in lieu of tax payments, if it has the above indemnity provision or similar provision in its purchase agreement with NPPD.

Very truly yours,

CROSBY GUENZEL LLP

SGS:

By


Steven G. Seglin

