

FORTY-SECOND DAY - MARCH 10, 2015**LEGISLATIVE JOURNAL****ONE HUNDRED FOURTH LEGISLATURE
FIRST SESSION****FORTY-SECOND DAY**

Legislative Chamber, Lincoln, Nebraska
Tuesday, March 10, 2015

PRAYER

The prayer was offered by Pastor Lewis Miller, Beemer Mennonite Church, Beemer.

ROLL CALL

Pursuant to adjournment, the Legislature met at 9:00 a.m., Speaker Hadley presiding.

The roll was called and all members were present except Senators Coash, Cook, Kuehn, Murante, and Schilz who were excused.

CORRECTIONS FOR THE JOURNAL

The Journal for the forty-first day was approved.

COMMITTEE REPORT(S)
Enrollment and Review

LEGISLATIVE BILL 146. Placed on Final Reading.

(Signed) Matt Hansen, Chairperson

COMMITTEE REPORT(S)
Banking, Commerce and Insurance

LEGISLATIVE BILL 223. Placed on General File with amendment.
AM681

1 1. Strike the original sections and insert the following new
2 sections:
3 Section 1. Section 44-8604, Revised Statutes Cumulative Supplement,
4 2014, is amended to read:
5 44-8604 (1) A residential contractor shall not promise to rebate
6 any portion of an insurance deductible as an inducement to the sale of
7 goods or services. A promise to rebate any portion of an insurance
8 deductible includes granting any allowance or offering any discount

9 against the fees to be charged or paying an insured or a person directly
10 or indirectly associated with the residential real estate any form of
11 compensation, except for any item of nominal value.
12 (2) A residential contractor shall not represent, negotiate on
13 behalf of, or offer or advertise to represent or negotiate on behalf of
14 an owner or possessor of residential real estate in any insurance claim,
15 or take an assignment of any such claim, relating to the repair or
16 replacement of roof systems or relating to the performance of any other
17 exterior repair, replacement, or reconstruction work on the residential
18 real estate.
19 Sec. 2. Original section 44-8604, Revised Statutes Cumulative
20 Supplement, 2014, is repealed.

LEGISLATIVE BILL 226. Placed on General File with amendment.
AM585 is available in the Bill Room.

LEGISLATIVE BILL 457. Placed on General File with amendment.
AM694

1 1. Insert the following new section:
2 Sec. 6. Since an emergency exists, this act takes effect when passed
3 and approved according to law.
4 2. On page 3, strike beginning with the comma in line 20 through
5 "Fund" in line 21 and insert ". Upon such date, the State Treasurer shall
6 transfer fifty percent of the money in the fund to the Site and Building
7 Development Fund and fifty percent of the money in the fund to the
8 Affordable Housing Trust Fund".

LEGISLATIVE BILL 632. Placed on General File with amendment.
AM695

1 1. Strike the original sections and insert the following new
2 sections:
3 Section 1. Nothing in the insurance laws of this state prohibits an
4 employer or association from entering into a contract, agreement, or
5 arrangement with an agent or broker that provides for or results in a fee
6 being paid by the employer or association to the agent or broker for the
7 sale of a health benefit plan. Such fee shall not exceed ten percent of
8 the total anticipated premium to be paid by the employer or association.
9 Such fee may be collected from the employer or association by the insurer
10 and directly passed through to the agent or broker and shall not be
11 considered a part of the premium paid by the employer or association for
12 the health benefit plan. A contract, agreement, or arrangement entered
13 into under this section shall specify its term, which shall not extend
14 past December 31, 2018, and the amount of the fee to be paid. The insurer
15 shall retain a copy of the contract, agreement, or arrangement pursuant
16 to the Insurers Examination Act.
17 Sec. 2. The Revisor of Statutes shall assign section 1 of this act
18 to Chapter 44, article 3.

(Signed) Jim Scheer, Chairperson

Revenue

LEGISLATIVE BILL 216. Placed on General File.

LEGISLATIVE BILL 217. Placed on General File.

LEGISLATIVE BILL 218. Placed on General File.

LEGISLATIVE BILL 325. Placed on General File.

LEGISLATIVE BILL 428. Placed on General File with amendment.

AM733

1 1. Strike the original sections and insert the following new

2 sections:

3 Section 1. Section 60-3,185, Reissue Revised Statutes of Nebraska,

4 is amended to read:

5 60-3,185 A motor vehicle tax is imposed on motor vehicles registered

6 for operation upon the highways of this state, except:

7 (1) Motor vehicles exempt from the registration fee in section

8 60-3,160;

9 (2) One motor vehicle owned and used for his or her personal

10 transportation by a disabled or blind veteran of the United States Armed

11 Forces as defined in section 77-202.23 whose disability or blindness is

12 recognized by the United States Department of Veterans Affairs and who

13 was discharged or otherwise separated with a characterization of

14 honorable if an application for the exemption has been approved under

15 subsection (1) of section 60-3,189;

16 (3) Motor vehicles owned by Indians as defined in 25 U.S.C. 479;

17 (4) Motor vehicles owned by a member of the United States Armed

18 Forces serving in this state in compliance with military or naval orders

19 if such person is a resident of a state other than Nebraska;

20 (5) Motor vehicles owned by the state and its governmental

21 subdivisions and exempt as provided in subdivision (1)(a) or (b) of

22 section 77-202;

23 (6) Motor vehicles owned and used exclusively by an organization or

24 society qualified for a tax exemption provided in subdivision (1)(c) or

25 (d) of section 77-202 if an application for the exemption provided in

26 this subdivision has been approved under subsection (2) of section

27 60-3,189; ~~and~~

1 (7) Trucks, trailers, or combinations thereof registered under

2 section 60-3,198; ~~and~~ -

3 (8) One motor vehicle owned and used for his or her personal

4 transportation by a veteran of the United States Armed Forces who was

5 discharged or otherwise separated with a characterization of honorable or

6 general (under honorable conditions) and who is classified by the United

7 States Department of Veterans Affairs as one hundred percent service-

8 connected disabled if an application for the exemption has been approved

9 under subsection (3) of section 60-3,189.

10 Sec. 2. Section 60-3,189, Revised Statutes Cumulative Supplement,

11 2014, is amended to read:

12 60-3,189 (1) A veteran of the United States Armed Forces who

13 qualifies for an exemption from the motor vehicle tax under subdivision

14 (2) of section 60-3,185 shall apply for the exemption to the county
15 treasurer not more than fifteen days before and not later than thirty
16 days after the registration date for the motor vehicle. A renewal
17 application shall be made annually not sooner than the first day of the
18 last month of the registration period or later than the last day of the
19 registration period. The county treasurer shall approve or deny the
20 application and notify the applicant of his or her decision within twenty
21 days after the filing of the application. An applicant may appeal the
22 denial of an application to the county board of equalization within
23 twenty days after the date the notice was mailed.

24 (2) An organization which qualifies for an exemption from the motor
25 vehicle tax under subdivision (6) of section 60-3,185 shall apply for the
26 exemption to the county treasurer not more than fifteen days before and
27 not later than thirty days after the registration date for the motor
28 vehicle. For a newly acquired motor vehicle, an application for exemption
29 must be made within thirty days after the purchase date. A renewal
30 application shall be made annually not sooner than the first day of the
31 last month of the registration period or later than the last day of the
1 registration period. The county treasurer shall examine the application
2 and recommend either exempt or nonexempt status to the county board of
3 equalization within twenty days after receipt of the application. The
4 county board of equalization, after a hearing on ten days' notice to the
5 applicant and after considering the recommendation of the county
6 treasurer and any other information it may obtain, shall approve or deny
7 the exemption on the basis of law and of rules and regulations adopted
8 and promulgated by the Tax Commissioner within thirty days after the
9 hearing. The county board of equalization shall mail or deliver its final
10 decision to the applicant and the county treasurer within seven days
11 after the date of decision. The decision of the county board of
12 equalization may be appealed to the Tax Equalization and Review
13 Commission in accordance with the Tax Equalization and Review Commission
14 Act within thirty days after the final decision.

15 (3)(a) A veteran of the United States Armed Forces who qualifies for
16 an exemption from the motor vehicle tax under subdivision (8) of section
17 60-3,185 shall apply for the exemption to the county treasurer not more
18 than fifteen days before and not later than thirty days after the
19 registration date for the motor vehicle. A renewal application shall be
20 made annually not sooner than the first day of the last month of the
21 registration period or later than the last day of the registration
22 period. Any such application or renewal application shall include such
23 documentation as required by the county treasurer to verify that the
24 applicant qualifies for such exemption. The county treasurer shall
25 approve or deny the application and notify the applicant of his or her
26 decision within twenty days after the filing of the application. An
27 applicant may appeal the denial of an application to the county board of
28 equalization within twenty days after the date the notice was mailed.
29 (b) The failure of an applicant to apply for an exemption or the
30 renewal of an exemption within the time periods specified in subdivision
31 (3)(a) of this section shall not preclude such applicant from receiving

1 the exemption or renewal if he or she is otherwise qualified.
2 (c) The county treasurer shall, on or before December 31 of each
3 year, certify to the Tax Commissioner the total motor vehicle tax revenue
4 that will be lost during that year because of the exemption allowed under
5 subdivision (8) of section 60-3,185. The Tax Commissioner shall, on or
6 before January 15 next following such certification, notify the Director
7 of Administrative Services of the amount so certified to be reimbursed by
8 the state. Reimbursement of the funds lost shall be made to each county
9 according to the certification and shall be distributed on the last
10 business day of January. The State Treasurer shall, on the business day
11 preceding the last business day of January, notify the Director of
12 Administrative Services of the amount of funds available in the General
13 Fund for payment purposes. The Director of Administrative Services shall,
14 on the last business day of January, draw warrants against funds
15 appropriated. The county treasurer shall allocate and distribute the
16 amount received pursuant to this subdivision in the same manner as the
17 proceeds from motor vehicle taxes are allocated and distributed pursuant
18 to section 60-3,186.
19 Sec. 3. Original section 60-3,185, Reissue Revised Statutes of
20 Nebraska, and section 60-3,189, Revised Statutes Cumulative Supplement,
21 2014, are repealed.

LEGISLATIVE BILL 510. Placed on General File with amendment.
AM732

1 1. On page 2, strike lines 13 and 14 and insert the following new
2 subdivision:
3 "(a) The payment of tuition at a Nebraska public institution of
4 postsecondary education or the payment of the costs associated with a
5 high school equivalency program for eligible employees:".

(Signed) Mike Gloor, Chairperson

Transportation and Telecommunications

LEGISLATIVE BILL 47. Placed on General File with amendment.
AM635 is available in the Bill Room.

(Signed) Jim Smith, Chairperson

Banking, Commerce and Insurance

The Banking, Commerce and Insurance Committee desires to report favorably upon the appointment(s) listed below. The Committee suggests the appointments(s) be confirmed by the Legislature and suggests a record vote.

Brenda L. Hicks-Sorensen, Director - Department of Economic Development

Aye: 8 Campbell, Craighead, Gloor, Howard, Lindstrom, Scheer, Schumacher, Williams. Nay: 0. Absent: 0. Present and not voting: 0.

(Signed) Jim Scheer, Chairperson

ANNOUNCEMENT(S)

Senator Hadley designates LB498 as his priority bill.

CONFLICT OF INTEREST STATEMENT(S)

Pursuant to Rule 1, Sec. 19, Senator Mello has filed Potential Conflict of Interest Statements under the Nebraska Political Accountability and Disclosure Act. The statements are on file in the Clerk of the Legislature's Office.

ATTORNEY GENERAL'S OPINIONOpinion 15-004

SUBJECT: Interpretation of LB 70 as Amended – Imposition of an Additional Occupation Tax Under the Mechanical Amusement Device Tax Act for Certain Devices.

REQUESTED BY: Senator Jim Smith
Nebraska Legislature

WRITTEN BY: Doug Peterson, Attorney General
L. Jay Bartel, Assistant Attorney General

The Mechanical Amusement Device Tax Act, Neb. Rev. Stat. §§ 77-3001 to 77-3011 (2009) [the “MAD Tax Act”], imposes an occupation tax on the business of operating mechanical amusement devices within the State of Nebraska. The tax is due and payable on January of each year on each machine or device in operation on that date, or before the time the machine or device is placed in operation for machines or devices put into operation after January 1. Neb. Rev. Stat. § 77-3004(2) (2009). Currently, the occupation tax is thirty-five dollars for each machine or device in operation

on January 1, and twenty-five dollars for machines or devices placed in operation after July 1 of the tax year. Neb. Rev. Stat. § 77-3004(4) (2009). “Mechanical amusement device” is defined to include “any machine which, upon insertion of a coin, currency, credit card, or substitute into the machine, operates or may be operated or used for a game, contest, or amusement of any description” Neb. Rev. Stat. § 77-3001(2) (2009). “[D]evices that are mechanically constructed in a manner that would render their operation illegal under the laws of the State of Nebraska...” are excluded from the definition of “mechanical amusement device.” *Id.*

LB 70, as originally introduced, authorized a city or village to levy an additional occupation tax on the business of operating mechanical amusement devices awarding a monetary prize or anything redeemable for a monetary prize within the boundaries of the city or village, or, for devices operated outside a city or village, authorized a county to levy an additional occupation tax. LB 70, § 2(1). The amount of the additional occupation tax was ten percent of gross revenue derived from operation of the devices. LB 70, § 2(2). The committee amendment to LB 70 (AM118) eliminated the local tax authorized in the original bill, and instead provided that the additional tax of ten percent of gross revenue derived from operation of machines or devices subject to the tax was to be collected by the Tax Commissioner concurrently with the state sales tax. AM 118, § 2(3). The amendment further limited application of the additional occupation tax, providing that it was to be levied

upon the business of operating a mechanical amusement device that:

- (a) Accepts currency, coins, tokens, or other value in exchange for play;
- (b) Awards a monetary prize or anything redeemable for a monetary prize;
- (c) Is played by a player using a touch screen, computer mouse, touch pad, light pen, laser, or device of similar function by which the player competes against software running the device; and
- (d) Has not been adjudicated by a court of competent jurisdiction within the State of Nebraska to not constitute a gambling device as defined in subdivision (5) of section 28-1101. Any such adjudication shall be by way of a final order in which the Tax Commissioner has been made a party to the action and written notice shall have been provided to the Attorney General at the commencement of the action. AM 118, § 2(1).

AM 118 also limited the circumstances under which an operator subject to the additional occupation tax could demonstrate a mechanical amusement device was not subject to the tax, providing:

If an operator believes that a mechanical amusement device is not subject to [the additional occupation tax imposed] under subsection (1) of this section, the burden is on the operator to prove to the Tax Commissioner that such device does not have one or more of the characteristics required for taxability under subsection (1) of this section. Such proof may be made by, among other things, a showing that the software running the game remains constant with the nature of a game that had its software at issue in a judicial case, not overturned by appeal, in which the State of Nebraska was party, the issue was litigated, and the final order found that the particular game is more controlled by the player than not, and thus is predominately a game of skill. AM 118, § 2(2).

AM 118 also provided that the additional occupation tax “shall not apply to any device not within the definition of a gambling device as defined in subdivision (5) of section 28-1101 or to any device that is specifically authorized by law.” AM118, § 2(5). AM 118 was adopted and has been placed on Select File with ER 27.

You have asked for our opinion on two questions regarding the interpretation of LB 70 as amended. In addition, you have requested our view on potential legal ramifications of the bill on the prosecution of cases involving potentially illegal gambling devices. Your questions, and our responses, are set out below.

- 1. Section 2(1)(d) limits application of the tax to those devices that have “not been adjudicated...to not constitute a gambling device...” First, how do you interpret this provision? Second, does this provision exempt from the new tax those devices which were adjudicated in *American Amusements Co. v. Nebraska Department of Revenue*, 282 908, 807 N.W.2d 492 (2011)? I am concerned that the language appears to exempt the devices at issue in that case in their entirety even though the court only found that certain games on the devices were legal. Is that correct?**

Section 2(1)(d) imposes the additional occupation tax on any mechanical amusement device that “[h]as not been adjudicated by a court of competent jurisdiction within the State of Nebraska to not constitute a gambling device as defined in subdivision (5) of section 28-1101.” This subsection further provides: “Any such adjudication shall be by way of final order in which the Tax Commissioner has been made a party to the action and written notice shall have been provided to the Attorney General at the commencement of the action.”

“Statutory language is to be given its plain and ordinary meaning in the absence of anything indicating to the contrary.” *PSB Credit Services, Inc. v. Rich*, 251 Neb. 474, 477, 558 N.W.2d 295, 297 (1997). The plain language

of § 2(1)(d) provides that a mechanical amusement device subject to the additional occupation tax is one that meets the criteria in subsections (a) through (c) (accepts currency, coins, tokens, or other value in exchange for play, awards a monetary prize or anything redeemable for a monetary prize, and is played by a player using a touch screen, computer mouse, touch pad, light pen, or device of similar function by which the player competes against software running the device), and has not been adjudicated by a Nebraska court to not constitute a gambling device as defined in § 28-1101(5). Further, that adjudication must be by a final order in a case where the Tax Commissioner has been a party and the Attorney General received written notice when the action was commenced.

The only device that would currently be excluded under § 2(1)(d) is the Bankshot game at issue in *American Amusement Co. v. Nebraska Dep't of Revenue*, 282 Neb. 908, 807 N.W.2d 492 (2011) [*"American Amusements"*]. *American Amusements* involved whether a video game called "Bankshot" was an unlawful game of chance and thus an illegal gambling device. The game could be played in various modes (Spin, Slow, and Fast), and included certain bonus and jackpot prizes. The Nebraska Supreme Court affirmed the district court's finding that the Bankshot game, when played in the Spin mode, was not a game of chance, as, in this version, the game "was more controlled by the player than not, and thus [was] predominately a game of skill." 282 Neb. at 925, 807 N.W.2d at 504. The district court found that the outcome of the Bankshot game, when played in the Slow mode, was determined predominately by chance, and thus was illegal gambling. *Id.* at 914, 807 N.W.2d 497. The district court found neither party carried its burden to prove the nature of the game in Fast Mode, and thus made no decision on whether the game was gambling in this mode. *Id.* In addition, the district court determined that Bankshot's pool bonus and jackpot were not gambling in the Spin mode, but were gambling in the Slow mode, and that both the Fast Break Bonus and the Speed Break bonus were gambling. *Id.* No cross-appeal was taken from the district court's findings "that (1) the Speed Break and Fast Break bonus games of Bankshot [were] games of chance; [and] (2) Bankshot when played in the Slow mode [was] a game of chance..." *Id.* at 916, 807 N.W.2d at 498. Further, the Fast Mode of play was eliminated following the district court decision and was not at issue before the Supreme Court. *Id.* Thus, the only question presented to the Supreme Court was "whether the district court properly found that Bankshot [was] not a game of chance when played in Spin mode." *Id.* at 916, 807 N.W.2d at 498-99.

The Bankshot device would not fall within the parameters established in § 2(1)(d), as it was adjudicated by a final order of the Supreme Court to not be a game of chance, and thus not an illegal gambling device under § 2-1101(5). Also, the Tax Commissioner was a party in *American Amusements*, and the Attorney General obviously had written notice of the case at its commencement, as the Attorney General was also made a party to that litigation. While the Bankshot game adjudicated in *American Amusements* would be a device satisfying the criteria for exclusion from the

tax set forth in § 2(1)(d), only the version of the game in Spin mode was held not to constitute a game of chance and thus not an illegal gambling device.

“If possible, a statute should be construed in such a way as to negative any constitutional infirmity.” *Prendergast v. Nelson*, 199 Neb. 97, 111, 256 N.W.2d 657, 667 (1977). Construing § 2(1)(d) to remove from taxation those versions of the Bankshot game that were found to constitute a game of chance must be avoided, as it would attempt to authorize illegal conduct. Such an interpretation cannot be adopted if a permissible construction can be made which does not produce such a result. Section 2(1)(d) thus must be interpreted to exclude from taxation only the Bankshot game in the Spin mode, as that is the only version of the game that has been adjudicated by final court order not to constitute a game of chance or illegal gambling device. Accordingly, we do not interpret this provision to exempt from taxation the other versions of the Bankshot game that were either found to be impermissible games of chance (the Slow Mode and the Speed Break and Fast Break Bonus), or were not the subject of a final adjudication as to whether the game was predominately chance or skill (the Fast mode).

2. **When subsection (d) is read together with Section 2(2), does it exempt from the new tax not only those devices adjudicated in *American Amusements*, but all present or future devices which are programmed with software of the “same” nature as those devices? Is there any existing statutory or case law which would inform or direct the Tax Commissioner as to what constitutes software that remains constant with “the nature” of software previously adjudicated by a court?**

Subsection 2(2) provides the operator of a mechanical amusement device must pay the additional occupation tax unless the operator can prove the device is not subject to the tax because it does not have one or more of the characteristics making it taxable under subsection (1). This “proof may be made by, among other things, a showing that the software running the game remains constant with the nature of a game that had its software at issue in a judicial case, not overturned by appeal, in which the State of Nebraska was a party, the issue was litigated, and the final order found that the particular game is controlled more by the player than not, and thus is predominately a game of skill.” § 2(2).

Construed with § 2(1)(d), this subsection would exempt the Bankshot game in Spin mode and any version of the game using software which runs “constant” with that version of the game. We have no way of knowing if other devices could be programmed with software of the same “nature” within the meaning of § 2(2). No further definition or explanation of the terms used in § 2(2) is provided, nor are we aware of any statute or case law which would aid in construing the proof requirement articulated in this subsection. If called on to interpret this provision, the Tax Commissioner

would have to determine if the software running a device an operator believes falls under this subsection is “constant with the nature of a game” in which the software was found not to constitute a game of chance, which presently includes only the Bankshot game in Spin mode. Also, it is unclear if other games could use software of the same “nature” as Bankshot, as the Bankshot software may well be proprietary and not available to other game manufacturers or distributors.

3. Finally, are there any legal ramifications with regard to the state’s ability to litigate future cases involving gaming devices by adopting the language in LB 70? Simply put, would LB 70 impede the Legislature’s ability to regulate gaming in the state?

We understand your final question as asking if imposition of the additional occupation tax imposed under LB 70, as amended, would sanction or legalize devices or machines which are subject to the tax, even if those devices or machines may constitute games of chance or illegal gambling devices under § 28-1101(5), but their legality has not been judicially determined. For several reasons, the bill does not, and cannot, have that effect.

The definition of mechanical amusement device in the MAD Tax Act specifically excludes “devices which are mechanically constructed in a manner that would render their operation illegal under the laws of the State of Nebraska.” Neb. Rev. Stat. § 77-3001(2) (2009). The mere presence of a decal signifying payment of the occupation tax required under the MAD Tax Act does not legitimize machines or devices that are otherwise unlawful gambling devices, and such machines or devices are subject to forfeiture. *See State v. Two IGT Video Poker Games*, 237 Neb. 145, 147, 465 N.W.2d 453, 456 (1991) (Noting machines seized and ordered forfeited as illegal gambling devices “had affixed to them mechanical amusement device stickers from the Nebraska Department of Revenue.”). Just as affixing a MAD Tax decal to an illegal gambling device does not make the device legal, assessment and payment of the additional occupation tax imposed by LB 70 as amended would not be determinative of the legality or illegality of any machine or device upon which the tax is assessed and paid. Indeed, a tax is imposed on marijuana and other controlled substances possessed by dealers under the Marijuana and Controlled Substances Tax Act, Neb. Rev. Stat. §§ 77-4302 to 77-4316 (2009). The imposition of a tax on dealers possessing marijuana and other controlled substances, and subjecting dealers who fail to pay the tax and affix the required stamps on all marijuana and controlled substances to penalties for noncompliance, does not legalize possession of these drugs by dealers, who would still be subject to prosecution for violation of criminal statutes related to illegal drug possession.

Unlike the tax imposed on marijuana and other controlled substances under §§ 77-3402 to 77-4316, however, which can apply only to drugs that

are illegal and subject to criminal sanction, the additional occupation tax imposed under LB 70 as amended applies to any device that falls within the criteria in § 2(1)(a)-(d), even though the device may or may not constitute a game of chance or be an illegal gambling device. The Committee Records on LB 70 indicate a concern that machines that “may well be unlawful...” have been placed in operation subsequent to the decision in *American Amusements*. Committee Records on LB 70, 104th Leg., 1st Sess. 1 (Jan. 23, 2014). The Introducer’s Statement of Intent further states that, with respect to imposition of the additional occupation tax, the intent is to “place the burden of proof on the operator to establish the lawfulness of the game and entitlement to exemption from the tax.” *Id.*, Introducer’s Statement at 1.

Section 2(5) of the bill provides: “The occupation tax imposed in this section shall not apply to any device not within the definition of a gambling device as defined in subdivision (5) of section 28-1101 or to any device that is specifically authorized by law.” Thus, under this subsection, the tax is not to be imposed on any device that is not unlawful under § 28-1101(5). Other than the limited exclusion in § 2(1)(d) for devices that meet the requirements of subsections (a) through (c) and have been “finally adjudicated” to not constitute an illegal gambling device (which is limited to a single device), or devices using software that “remains constant with the nature of a game” judicially determined not to be a game of chance (again limited to a single game or device), there is no mechanism in the bill for an operator to seek exemption from the additional occupation tax by establishing a particular machine or device is not illegal under § 28-1101(5).

“Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the demands of the Due Process Clause.” *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36 (1990) [*McKesson*]. “A state has flexibility to provide [a] remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both.” *Reich v. Collins*, 513 U.S. 106, 108 (1994). If taxpayers are not provided “with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment’s validity...”, taxpayers can be required “to raise their objections in a postdeprivation refund action.” *McKesson*, 496 U.S. at 38. “To satisfy the requirements of the Due Process Clause...”, the refund action “must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a ‘clear and certain remedy,’..., for any erroneous or unlawful tax collection to ensure the opportunity to contest the tax is a meaningful one.” *Id.* at 38-39 (citation omitted).

Apart from proving to the Tax Commissioner that a machine or device does not satisfy one or more of the criteria in § 2(1)(a) to (d), including demonstrating the game software is constant with the nature of a game adjudicated to be lawful under § 2(2), LB 70 as amended provides no mechanism for an operator to seek a determination by the Tax

Commissioner that a machine or device is not a gambling device as defined in § 28-1101(5) and thus not subject to the additional occupation tax. While such a pre-deprivation remedy is not constitutionally required if an adequate post-deprivation remedy exists, the bill could be amended to permit an operator of a machine or device to make a showing to the Tax Commissioner that a device is legal and thus should be exempt from imposition of the additional tax. If the Tax Commissioner found that showing to be insufficient, the operator could be provided an opportunity for an administrative hearing to present evidence that a machine or device is lawful and not subject to the additional occupation tax, after which the Tax Commissioner would enter a final decision either approving or denying the exemption. If denied, the Tax Commissioner's final decision would be appealable under the Administrative Procedure Act ["APA"] as a final decision in a contested case. *See* Neb. Rev. Stat. § 84-901(3) and 84-917 (2014).¹

If no pre-deprivation remedy is provided, a person paying the additional tax must be afforded a post-deprivation procedure to contest imposition of the tax. Neither LB 70 as amended nor the MAD Tax Act currently contain a specific refund process. The Legislature has, however, established a procedure for taxpayers to seek refunds of taxes collected by the Tax Commissioner where no specific refund provision has been enacted. Neb. Rev. Stat. §§ 77-1777 to 77-1782 (2009). Under this procedure, a taxpayer can file a written claim for refund with the Tax Commissioner, and request a hearing before the Tax Commissioner prior to action on the refund claim. Neb. Rev. Stat. §§ 77-1779 and 77-1780 (2009). If the claim is denied, the taxpayer can appeal the denial pursuant to the APA. Neb. Rev. Stat. § 77-1781 (2009). While this remedy presumably would be available, it may be advisable to amend LB 70 to adopt a specific refund remedy.

¹ Rather than imposition of an additional tax on devices of the type LB 70 intends to reach, an alternative would be to require that, prior to an operator being issued a decal or sticker to permit use of the device as a mechanical amusement device, the operator be required to make a showing of the legality of the game to the Tax Commissioner. The administrative process could provide for a hearing in the event the Tax Commissioner initially disapproves an application for permission to use the device, and a final decision subject to appeal if the application is denied. A process of this nature would require a showing a device is a lawful mechanical amusement device prior to issuance of the required MAD Tax decal or sticker. The purpose and focus of this process is regulation, rather than additional taxation.

Very truly yours,
 DOUG PETERSON
 Attorney General
 (Signed) L. Jay Bartel
 Assistant Attorney General

pc Patrick J. O'Donnell
 Clerk of the Nebraska Legislature
 07-920-29

RESOLUTION(S)

Pursuant to Rule 4, Sec. 5(b), LRs 91 and 92 were adopted.

SPEAKER SIGNED

While the Legislature was in session and capable of transacting business, the Speaker signed the following: LRs 91 and 92.

RESOLUTION(S)

LEGISLATIVE RESOLUTION 109. Introduced by Gloor, 35.

WHEREAS, the Nebraska Library Association has named Cathy Blanchard of Omaha, Audi Blann of La Vista, Judy Briggs of Grand Island, Pat Hunsche of Blair, and Haylee Wawrzynkiewicz of Papillion as outstanding library volunteers; and

WHEREAS, this award is given to outstanding individuals who have shown a strong desire to give back to their communities and who have given generously of their time through many years of volunteer library service; and

WHEREAS, these individuals will be recognized at the Nebraska Library Association's Advocacy Day; and

WHEREAS, the Nebraska Library Association supports and promotes all libraries, library media centers, and library services in the state. Its foremost concerns are the professional development of its members, library advocacy, and open access to information for all citizens.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE ONE HUNDRED FOURTH LEGISLATURE OF NEBRASKA, FIRST SESSION:

1. That the Legislature congratulates Cathy Blanchard, Audi Blann, Judy Briggs, Pat Hunsche, and Haylee Wawrzynkiewicz on being named outstanding library volunteers by the Nebraska Library Association.

2. That a copy of this resolution be sent to Cathy Blanchard, Audi Blann, Judy Briggs, Pat Hunsche, and Haylee Wawrzynkiewicz and to the Nebraska Library Association.

Laid over.

ANNOUNCEMENT

The Chair announced the birthday of Senator K. Haar.

VISITORS

Visitors to the Chamber were members of Girl Scouts Spirit of Nebraska from across the state; and 4 members of UNL Delta Tau Delta Fraternity.

The Doctor of the Day was Dr. Kristi Kohl from Grant.

ADJOURNMENT

At 9:13 a.m., on a motion by Senator McCollister, the Legislature adjourned until 9:00 a.m., Wednesday, March 11, 2015.

Patrick J. O'Donnell
Clerk of the Legislature

