

LR 220 (2011) Revenue Committee Report: Examine Occupation Taxes.

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Appendix A: "Occupation Taxes", *Frequently Asked Questions*, Nebraska Department of Revenue (2011).

Appendix B: "Comprehensive Fee Schedule", Kearney City Council Resolution No. 2011-91 (eff. October 1, 2011).

Appendix C: "Local Business (B&O) Tax Rates", Association of Washington Cities (April 18, 2011).

I. Purpose of LR 220 (2011): The purpose of LR 220 is to “examine issues pertaining to the imposition of occupation taxes by local governments. The issues addressed by this study shall include, but not be limited to, determining: (1) The nature or classification of such taxes; (2) The subject or subjects of such taxes; (3) The measure or measures of such taxes; (4) The rate or rates of such taxes, and whether statutory tax rate limitations exist; (5) The taxpayer subject to such taxes; and (6) Constitutional limitations on the imposition of such taxes.”¹

II. Occupation Tax Defined

An occupation tax is generally defined to mean “[a]n excise tax imposed for the privilege of carrying on a business, trade, or profession.”²

An occupation tax has also been generally defined to mean “[a] charge for the privilege of following an occupation or trade, or carrying on a business, is an excise tax, that is, an indirect tax, and has no reference to earnings or income, except that the sum of such earnings or income may, as anything else may, be made the measure of the tax. . . . A person or corporation doing an interstate business can no more escape it than those doing business within one state.”³

III. Basic Elements in the Analysis of Taxes

The following material provides a fundamental framework for dissecting and analyzing any type of tax. It might prove to be especially helpful when analyzing occupation taxes.

A. The Nature or Classification of a Tax

“The classification of taxes, like most classifications, depends largely on the purposes of the classifier.”⁴

“The Tennessee Supreme Court drew the distinction between direct and indirect taxes in the following terms: ‘A direct tax is one that is imposed on property according to its value. It is generally spoken of as a property tax, or an ad valorem tax. An indirect tax is a tax upon some right or privilege, and it is also called an excise or *occupation tax*.’”⁵

¹ LR 220 (2011).

² *Black’s Law Dictionary*, p. 1596 (9th ed., 2009).

³ *Corpus Juris Secundum*, Vol. 47B, Internal Revenue, § 590, p. 744 (2011 Thomson Reuters).

⁴ Hellerstein and Hellerstein, *State and Local Taxation*, p. 21 (6th ed. 1997)(hereinafter cited as *State and Local Taxation*).

⁵ *State and Local Taxation*, p. 2, quoting and citing *Foster & Creighton Co. v. Graham*, 154 Tenn. 412, 285 S.W. 570, 572 (1926)(emphasis added).

“Judge Cooley’s classic treatise on taxation classifies taxes as (1) capitation or poll taxes, (2) taxes on property, and (3) excise taxes. . . . In addition, the Cooley treatise categorizes taxes as (1) specific or (2) ad valorem.”⁶

“The following classification appears to be the most useful for state and local tax purposes in light of the classification issues that usually arise: 1. Property taxes. 2. Excise taxes. (3) Income taxes. 4. Capitation or poll taxes.”⁷

B. The Subject of Taxation

“A workable definition of the *subject* of a tax is (1) the property taxed in the case of a property tax; (2) the activity, event, privilege or specific property right taxed in the case of an excise tax; and (3) the income received or accrued in the case of an income tax.”⁸

C. The Measure of a Tax

“The *measure* of a tax is the yardstick or base to which the tax rate is applied.”⁹

- “In the typical real property tax the subject of the tax is the real property. The measure is the value of the property to which the local millage rate is applied. . . .”¹⁰
- “In sales taxes, which are excise taxes, the subject of the tax is the making of a sale. The measure is the sales price of the goods or services to which the rate . . . is applied.”¹¹
- “With income taxes, whether net income or gross income, the subject of the tax and the measure of the tax are the same, or very close to the same. . . . The same net income or gross income (reduced, in some instances, by personal exemptions and deductions) is the measure of the tax to which the rate is applied.”¹²

⁶ *State and Local Taxation*, p. 21, citing T. Cooley, *The Law of Taxation*, § 38 (4th ed. 1924).

⁷ *State and Local Taxation*, pp. 21-22.

⁸ *State and Local Taxation*, p. 23 (emphasis in original).

⁹ *State and Local Taxation*, p. 23 (emphasis in original).

¹⁰ *State and Local Taxation*, p. 23.

¹¹ *State and Local Taxation*, p. 23.

¹² *State and Local Taxation*, p. 23.

“Measures of taxes vary widely.”¹³ The following is a list of the more prevalent measures of taxes used in the United States—

- (1) The Value of Property: Property taxes; estate and inheritance taxes; and capital stock taxes.
- (2) Income or Receipts: Gross receipts; gross income taxes; and net income taxes.
- (3) Selling Price: Sales and use taxes.
- (4) Fixed or Flat Sums: Dollars or cents per pack of cigarettes and per gallon of gasoline; license taxes; and stock issue and transfer taxes.
- (5) Miscellaneous Measures: The weight of a motor vehicle for purposes of motor vehicle license taxes; the face amount of a bond for purposes of a bond issue tax; and the amount of authorized capital for purposes of corporate franchise taxes.¹⁴

D. Identifying the Taxpayer

In the context of occupation taxes and sales and use taxes, it is important to determine who the taxpayer is. Ordinarily, the “ultimate consumer” of goods and services subject to sales and use taxes is the taxpayer. By contrast, an occupation tax is usually imposed on and paid by a business entity for the privilege of doing business within a municipality’s geopolitical boundaries—even if the business entity passes along the cost of the occupation tax to its customers in the form of higher prices for its goods or services.

E. The Rate of a Tax

The rate of a tax is most often expressed as a percentage, but even if it’s not expressed as a percentage one can usually identify a mathematical common denominator in the rate of a tax that allows it to be converted to a percentage figure. Sometimes an occupation tax rate is expressed as a percentage figure, but not always. When an occupation tax rate is not expressed as a percentage figure, it creates complexity for lawmakers who are trying to craft a statutory occupation tax rate limit.

IV. Municipal Occupation Taxes in Nebraska

Municipal occupation tax rates and tax bases in Nebraska vary widely.¹⁵

¹³ *State and Local Taxation*, p. 23.

¹⁴ *State and Local Taxation*, pp. 23-24.

¹⁵ “Occupation Taxes”, *Frequently Asked Questions*, Nebraska Department of Revenue (2011) (http://www.revenue.ne.gov/info/occupation_tax.html). *Appendix A* contains a copy.

A. Occupation Taxes in the Cities of the Metropolitan Class: Omaha, NE

1. Statutory Authority to Impose Such Taxes

Neb. Rev. Stat. section 14-109(1) governs the authority of cities of the metropolitan class to impose occupation taxes. Section 14-109(1) was amended by Laws 2011, LB 81.

“(1)(a) The city council shall have power to tax for revenue, license, and regulate any person within the limits of the city by ordinance except as otherwise provided in this section. Such tax may include both a tax for revenue and license. The city council may raise revenue by levying and collecting a tax on any occupation or business within the limits of the city. All such taxes shall be uniform in respect to the class upon which they are imposed. All scientific and literary lectures and entertainments shall be exempt from taxation, as well as concerts and all other musical entertainments given exclusively by the citizens of the city. It shall be the duty of the city clerk to deliver to the city treasurer the certified copy of the ordinance levying such tax, and the city clerk shall append thereto a warrant requiring the city treasurer to collect such tax. (b) For purposes of this subsection, limits of the city does not include the extraterritorial zoning jurisdiction of such city.”¹⁶

2. Occupation Taxes Imposed by the City of Omaha

a. Omaha’s Transient Rental Guest Occupation Tax

Imposition and Amount of the Tax: “Each person engaged in the business of operating a hotel in the city shall pay an occupation tax in the following listed amounts: the occupation tax per occupied room per night shall be five and one-half percent upon the total consideration charged for occupancy of any space furnished by any hotel.”¹⁷

Collection of the Tax: “The tax imposed by this article may be collected by the hotel operator from the occupant of each room to which the tax applies. The tax may be shown as an add-on to the charge for occupancy of the rooms and shall be collectible at the time the lodging is furnished, regardless of when the charge for the occupancy is paid. The operator shall remain responsible for payment of all taxes imposed, whether or not the taxes are actually collected from the guests.”¹⁸

¹⁶ Neb. Rev. Stat. § 14-109(1). Source: Laws 1921, c. 116, art. I, § 9, p. 408; C.S.1922, § 3496; C.S.1929, § 14-109; R.S.1943, § 14-109; Laws 1997, LB 752, § 73; Laws 2011, LB 81, § 1 (operative January 1, 2011).

¹⁷ Omaha Municipal Code section 19-700.

¹⁸ Omaha Municipal Code section 19-703.

b. Omaha's Used Car Dealers Occupation Tax

Imposition of the Tax: "There is hereby levied and imposed an occupation tax on the business of buying or selling secondhand or used motor-driven vehicles, or of buying and selling secondhand or used parts or accessories thereto, or of storing secondhand or used motor-driven vehicles within the city. It shall be the duty of any person engaging in any such business to pay said tax."¹⁹

Amount of the Tax: "The occupation tax levied and imposed by the provisions of this article shall be as provided in section 19-90 of this Code."²⁰ Section 19-90 provides that: "The occupation tax imposed on the business of buying or selling secondhand or used motor-driven vehicles, or of buying and selling secondhand or used parts or accessories thereto, or of storing secondhand or used motor-driven vehicles within the city shall be \$25.00 per year."²¹

c. Omaha's Telephone Occupation Tax

Imposition of the Tax: "An occupation tax is hereby levied and imposed on every person who engages in the business of maintaining and operating a telephone plant and system for revenue in the city."²²

Amount of the Tax: "The occupation tax levied and imposed by the provisions of section 19-292 shall be as provided in section 19-88 of this Code."²³ Section 19-88 provides that: "The amount of the occupation tax levied and imposed on telephone companies shall be the sum of six and one-quarter percent of the gross receipts resulting from the sales of communications services within the corporate limits of the city which are subject to the sales and use tax imposed by sections 35-21 through 35-25 of the Omaha Municipal Code."²⁴

Collection of the Tax: "The payment of any occupation tax levied and imposed by the provisions of this article shall be made in quarterly payments using the calendar quarter year as a basis for determining the due date. Each quarterly payment shall be due 30 days immediately following the termination of each calendar quarter year."²⁵

¹⁹ Omaha Municipal Code section 19-312.

²⁰ Omaha Municipal Code section 19-313.

²¹ Omaha Municipal Code section 19-19.

²² Omaha Municipal Code section 19-292.

²³ Omaha Municipal Code section 19-293.

²⁴ Omaha Municipal Code section 19-88.

²⁵ Omaha Municipal Code section 19-296.

d. Omaha's Bingo License "Fee"

Amount of the Tax or Fee: "The license fee for the conducting of bingo within the city shall be \$10.00 per year."²⁶

Collection of the Tax: "Every person desiring a license required by the provisions of this division shall make application therefor to the state. Accompanying such application shall be: (a) A sworn statement by each designated supervising member that such member will be responsible for compliance with rules and regulations for each bingo occasion which he supervises. (b) A sworn statement by the member designated as responsible for the proper utilization of gross receipts that no commission, fee, rent, salary, profits, compensation, reward, or recompense will be paid to any person or organization except payments sanctioned by the treasurer and that all profits will be spent for a lawful purpose."²⁷

e. Omaha's Occupation Tax on Amusement and Vending Machines

Imposition and Collection of the Tax: "An occupation tax is hereby levied and imposed on every person selling any goods, wares or merchandise from, or operating or maintaining, any machine or device coming under the provisions of this article, except an electronic video amusement device or a mechanical amusement device, even though such occupation be incidental to another business, and the owner-operator of any electronic video amusement device or a mechanical amusement device. Every such operator within the city shall pay the tax in the amount and manner specified in this article. Every such owner-operator shall pay the tax in the amount and manner specified in this article, even though the owner-operator is domiciled outside the city."

Amount of the Tax: "The amount of tax levied under the provisions of this article shall be as provided in section 19-31 of this Code." The amount of tax levied under Omaha Municipal Code section 19-31 varies depending on the type of amusement or merchandise in question, as shown below:

(a) Automatic musical device for profit: (1) Operator, per machine \$25.00, but if such machine is placed into operation after September 1, for that taxable year, the amount of tax is \$12.50 per machine. (2) Distributor \$100.00.

(b) Electronic video amusement device for profit: (1) Occupation tax: Distributor, per machine or device \$25.00; Owner-operator, per machine or device \$25.00. But if such machine or device is placed into operation after September 1, for that taxable year \$12.50. (2) Permit fee: The annual permit fee for a distributor is \$100.00

²⁶ Omaha Municipal Code section 19-213.

²⁷ Omaha Municipal Code section 19-212.

(c) Mechanical amusement device for profit: (1) Owner-operator, per machine \$25.00. (2) Distributor, per machine \$25.00. But if such machine is placed into operation after September 1, for that taxable year, the tax is \$12.50.

(d) Merchandise vending machine for profit: (1) Operator, per machine \$3.00. But if such machine is placed into operation after September 1, for that taxable year, \$1.50. However, bulk vending machines, except soft drink or coffee machines, having a cost of \$0.25 or less per item or product, per operational handle, the tax is \$1.50. (2) Distributor \$75.00

(e) Tobacco products vending machine for profit: Operator, per machine \$25.00. But if such machine is placed into operation after September 1, for that taxable year, the tax is \$15.00.

f. Omaha's Occupation Tax on Retail Liquor Establishments

Imposition of Tax: "There is hereby levied and imposed an occupation tax upon each person who engages in or who may engage in the manufacture, distribution, or selling at retail of alcoholic liquors within the city."²⁸

Amount of the Tax: "The occupation tax imposed and levied by the provisions of this article shall be as provided in section 19-62 of this Code."²⁹ Omaha Municipal Code section 19-62 provides that: "(a) Except as provided in this section, the occupation tax for any person who engages in the manufacture, distribution, except distribution of sacramental wines for church users only, or selling at retail of alcoholic liquors within the city shall be two times the amount of the license fee required to be paid under the Nebraska Liquor Control Act, including amendments thereto, to obtain such a license. The city clerk shall maintain a schedule stating the applicable occupation tax and make the schedule available to the public upon request. (b) Each holder of a special designated license for sale or consumption of alcoholic liquor shall pay an occupation tax of \$25.00 for each day identified in the special designated license."³⁰ However, "[t]he tax levied and imposed by this article shall in no case exceed double the amount of the license fee required to be paid under the provisions of the Nebraska Liquor Control Act for the same period of time."³¹

g. Omaha's Firearms Dealer Occupation Tax

"The fee for a permit required by the provisions of this division shall be as provided in section 19-51 of this Code." Section 19-51 provides that: "All applicants for a permit to

²⁸ Omaha Municipal Code section 19-253.

²⁹ Omaha Municipal Code section 19-254.

³⁰ Omaha Municipal Code section 19-62.

³¹ Omaha Municipal Code section 19-255.

engage in the business of buying, selling, renting, pawning, pledging or trading any firearms, as provided in section 19-371 et seq., shall pay a permit fee in the amount of \$48.00 per year. Such fee shall be prorated at \$4.00 per month or any portion thereof when an application is made other than at the start of a calendar year.”³²

h. Omaha’s Railway Tracks Occupation Tax

“The occupation tax imposed and levied by the provisions of this article shall be as provided in section 19-75 of this Code.”³³ Section 19-75 provides that: “The occupation tax for every person keeping and maintaining any railway track over, under, in, upon or across any street in the city shall be the sum of \$0.35 for each linear foot of railway track so kept and maintained in the city.”³⁴ *However*, there are exemptions from the tax: “The provisions of this article shall not include any railway track so kept or maintained pursuant to a franchise from the city, nor to any such track for which a charge is required to be paid to the city for the space occupied, nor shall it apply to any main line railway tracks leading into, out of or through the city.”³⁵

i. Omaha’s Business Occupational Privilege Tax

Imposition and Amount of the Tax: “On or after 11:59 p.m. on June 30, 1985, and in each calendar month thereafter commencing with the month of July 1985 there is hereby imposed a business occupational privilege tax upon each and every person engaged in any business or occupation of every kind having a fixed or transitory situs within the city for any period of time in a calendar month. The amount of such tax shall be \$2.00 per month for the first owner, partner, manager or employee and the additional sum of \$2.00 per month for each and every additional owner, partner, manager and employee who performs any service or other business-related activity within the city for any period of time in a calendar month.”³⁶

Collection of the Tax: “Each and every person engaged in business within the city for the calendar month of July 1985 shall, on or before August 1985 and for each and every calendar month thereafter, on or before the last day of the month following, prepare and file a return for such taxable calendar month and at the same time pay to the manager the tax herein imposed for such calendar month. The tax shall be computed at the rate set forth in this article.”³⁷

³² Omaha Municipal Code section 19-51.

³³ Omaha Municipal Code section 19-323.

³⁴ Omaha Municipal Code section 19-75.

³⁵ Omaha Municipal Code section 19-322.

³⁶ Omaha Municipal Code section 19-502.

³⁷ Omaha Municipal Code section 19-505.

Exemptions from the Tax: “Nothing contained in this article shall be construed to empower the city to levy and collect the tax imposed upon any person engaged in business within the city not within the taxing power of the city under the Constitution of the United States and the constitution and statutes of the state.”³⁸

j. Omaha’s Employees Occupational Privilege Tax

Imposition and Amount of the Tax: “On and after 11:59 p.m. on June 30, 1985, and in each and every calendar month thereafter, commencing with the month of July 1985 there is hereby imposed by the city, upon each employee who performs services within the city for any period of time in a calendar month for an employer, an employee's occupational privilege tax, at the rate of \$2.00 per month for each and every month in which such employee is, for any period of time, so employed. This tax is in addition to all other taxes of any kind or nature levied by the city.”³⁹

Collection of the Tax—Employer Withholding: “On and after 11:59 p.m. on June 30, 1985, and in each and every calendar month thereafter, commencing with the month of July 1985 every employer within the city, as well as every employer situated outside of the city who engages in business within the city, and who employs one or more natural persons exercising within the city the taxable privilege set forth herein, is hereby charged with the duty of collecting monthly from each of his employees exercising the taxable privilege the sum of \$2.00 per month for each month in which such privilege is exercised, and with the duty of making a return and payment of such tax to the manager. Further, each employer is hereby authorized to deduct this tax from each employee in his employ, whether the employee is paid by salary, wages, commission or other compensation, and whether or not part or all such services are performed within the city.”⁴⁰

Collection of the Tax When Employer Is Exempt from Withholding Requirements—Employee Liability for Filing Monthly Tax Returns and Paying the Tax: “In the event an employer is exempt from the withholding provisions herein, the employee of such exempt employer shall make and file with the manager a monthly return for the preceding calendar month in such manner and upon such forms as the manager may prescribe, commencing on August 1, 1985, and on the first day of each month thereafter; and at the same time such employee shall pay to the manager the tax herein imposed for the preceding calendar month; provided that the manager, upon application by such employee, may permit the filing of quarterly returns and payment of such taxes upon a quarterly basis.”⁴¹

³⁸ Omaha Municipal Code section 19-504.

³⁹ Omaha Municipal Code section 19-602.

⁴⁰ Omaha Municipal Code section 19-603(a).

⁴¹ Omaha Municipal Code section 19-605.

Exemptions from the Tax: “Nothing contained in this article shall be construed to empower the city to levy and collect the tax hereby imposed upon any taxpayer not within the taxing power of the city under the Constitution of the United States and the constitution and statutes of the state.”⁴²

B. Occupation Taxes in the Cities of the Primary Class: Lincoln, NE

1. Statutory Authority to Impose Such Taxes

Neb. Rev. Stat. section 15-203 governs the authority of cities of the primary class to impose occupation taxes: “A city of the primary class shall have power to raise revenue by levying and collecting a license or occupation tax on any person, partnership, limited liability company, corporation, or business within the limits of the city and regulate the same by ordinance except as otherwise provided in this section and in section 15-212. All such taxes shall be uniform in respect to the class upon which they are imposed. All scientific and literary lectures and entertainments shall be exempt from such taxation as well as concerts and all other musical entertainments given exclusively by the citizens of the city.”⁴³

2. Occupation Taxes Imposed by the City of Lincoln

The following material shows that the City of Lincoln, Nebraska, imposes at least seven different occupation taxes.

a. Lincoln’s Restaurant Occupation Tax

Imposition of the Tax: “The amount of such tax shall be two percent (2%) of all gross receipts for each calendar month derived from the drinking places and restaurant businesses subject to this tax. Such tax shall be imposed on the gross receipts resulting from the sales of food within the corporate limits of the City which are subject to the sales and use tax imposed by Section 3.16.010 of the Lincoln Municipal Code.”⁴⁴

“The person engaged in operating a drinking place or restaurant business may itemize the tax levied on a bill, receipt, or other invoice to the purchaser, but each person engaged in such business shall remain liable for the tax imposed by this chapter.”⁴⁵

⁴² Omaha Municipal Code section 19-608.

⁴³ Neb. Rev. Stat. section 15-203. Source: Laws 1901, c. 16, § 129, XIV, p. 130; Laws 1905, c. 16, § 11, p. 212; R.S.1913, § 4425; C.S.1922, § 3809; C.S.1929, § 15-212; R.S.1943, § 15-203; Laws 1993, LB 121, § 131.

⁴⁴ Lincoln Municipal Code section 3.30.030(a).

⁴⁵ Lincoln Municipal Code section 3.30.030(b).

b. Lincoln's Hotel Occupation Tax

Imposition of the Tax: “[E]ach person engaged in the business of operating a hotel in the City shall pay an occupation tax in the amount of four percent (4%) of the total consideration charged for occupancy per occupied room per night.”⁴⁶

Collection of the Tax: “The tax imposed by this chapter may be shown as an add-on to the charge for occupancy of the rooms and shall be collectible at the time the lodging is furnished, regardless of when the charge for the occupancy is paid. The hotel operator shall remain responsible for payment of all taxes imposed, whether or not the taxes are actually collected from the guests.”⁴⁷

c. Lincoln's Car Rental Occupation Tax

Imposition and Collection of the Tax: “[E]ach person engaged in a car rental business shall pay an occupation tax in the amount of four percent (4%) of the actual rental rates charged for each vehicle rental contract made by that person within the city. The tax imposed by this chapter may be shown as an add-on to the charge for renting a vehicle and shall be collectible at the time the vehicle is furnished, regardless of when the charge for the vehicle is paid. The car rental business operator shall remain responsible for payment of all taxes imposed, whether or not the taxes are actually collected from the customers.”⁴⁸

d. Lincoln's Telephone Occupation Tax

Imposition of the Tax: “[T]here is hereby levied upon every person, firm, partnership, corporation, or association engaged in the business of offering, providing or selling telecommunication equipment or telecommunication services to the public for hire in the City of Lincoln an occupation tax of six percent (6%) on (1) the gross receipts resulting from any telecommunication services and charges to a customer for which telecommunication services are provided; and (2) the gross receipts resulting from any sale of telecommunication equipment.”⁴⁹

e. Lincoln's Vending Machine Occupation Tax

Imposition of the Tax: “There is hereby levied upon the business of every person engaged in the business of vending merchandise by means of an automatic merchandise vending machine an annual occupation tax based on the price per unit of the merchandise vended therefrom, as follows: (a) Machines vending merchandise at one cent per unit, fifty cents.

⁴⁶ Lincoln Municipal Code section 3.28.030.

⁴⁷ Lincoln Municipal Code section 3.28.030.

⁴⁸ Lincoln Municipal Code section 3.26.030.

⁴⁹ Lincoln Municipal Code section 3.24.080 (unnumbered paragraph one).

(b) Machines vending merchandise at five cents to twenty cents per unit, two dollars. (c) Machines vending merchandise at twenty-five cents or more per unit, four dollars. (d) Machines vending merchandise of multiple unit value. Where a single automatic merchandise vending machine provides for the vending of merchandise for unit prices as set forth in two or more of the above classifications, the annual occupation tax to be paid for each machine shall be four dollars per unit.”⁵⁰

f. Lincoln’s Theater Occupation Tax

Imposition of the Tax: “There is hereby levied upon the business of every person engaged in the business of operating or conducting any hall, theater, or place furnishing motion picture, dramatic, vaudeville, or theatrical entertainment of any kind as follows: \$100.00 for each such hall, theater, or place seating less than 600 patrons; \$300.00 for each such hall, theater, or place seating 600 patrons or more, but less than 1,000; and \$500.00 for each such hall, theater, or place seating 1,000 patrons or more. Such occupation tax shall be \$100.00 for drive-in theaters having less than 600 parking spaces; \$300.00 for each drive-in theater having more than 600 but less than 1,000 parking spaces; and \$500.00 for each such drive-in theater having 1,000 or more parking space.”⁵¹

C. Occupation Taxes in the Cities of the First Class: Kearney, NE

1. Statutory Authority to Impose Such Taxes

Neb. Rev. Stat. section 16-205 governs the authority of cities of the primary class to impose occupation taxes: “A city of the first class may raise revenue by levying and collecting a license or occupation tax on any person, partnership, limited liability company, corporation, or business within the limits of the city and to regulate same by ordinance. All such taxes shall be uniform in respect to the class upon which they are imposed. All scientific and literary lectures and entertainments shall be exempt from such taxation as well as concerts and all other musical entertainments given exclusively by the citizens of the city.”⁵²

2. Occupation Taxes Imposed by the City of Kearney, NE

The following material shows that the City of Kearney, Nebraska, imposes 15 different occupation taxes, some of which have numerous subclasses. Most of those taxes are fixed- and variable-dollar amount taxes, but some of them are single-percentage rate taxes (e.g., the telecommunications services companies occupation tax). *Appendix B* contains a copy of Kearney's “Comprehensive Fee Schedule” (effective October 1, 2011).

⁵⁰ Lincoln Municipal Code section 3.24.020.

⁵¹ Lincoln Municipal Code section 3.24.180.

⁵² Neb. Rev. Stat. section 16-205. Source: Laws 1901, c. 18, § 48, IX, p. 247; Laws 1907, c. 13, § 1, p. 110; R.S.1913, § 4821; C.S.1922, § 3989; C.S.1929, § 16-206; R.S.1943, § 16-205; Laws 1993, LB 121, § 135.

General Rule: “For the purpose of raising revenue, there is hereby levied an occupation tax upon each and every occupation and business carried on within the City as specified by this Article or in other sections of this Code making reference to this Article.”⁵³

Who is the Taxpayer? “Every person carrying on the occupation or business coming under the provisions of this Article within the City shall pay to the Director of Finance and Administration annually the sum named by this Article as a tax upon the occupation or business.”⁵⁴

Exemptions from Taxation: (1) “The provisions of this Article shall not extend nor affect individuals selling livestock, farm products or fuel raised or produced by the vendors or their employees.”⁵⁵ (2) “All scientific and literary lectures and entertainments shall be exempt from payment of occupation taxes as well as concerts and other entertainment given exclusively by the citizens of the City.”⁵⁶ (3) “Occupation taxes are not levied upon any business or occupation which is engaged in interstate commerce or which is done or conducted by any department of the government of the United States, the State, the City or the officers thereof in the course of their official duties, or by any county or subdivision of this State or its officers in the course of their official duties.”⁵⁷

***a. Kearney’s Occupation Tax on Alcoholic Beverage Dealers
& Distributors***

“For the purpose of raising revenue, there is hereby levied upon distributors, retailers, and nonbeverage users of alcoholic liquor in the City of Kearney an annual occupation tax in accordance with the City of Kearney Comprehensive Fee Schedule,”⁵⁸ which provides that: (1) The amount of the annual occupation tax to manufacture alcohol and spirits is \$2,000; (2) The amount of the annual occupation tax to manufacture wine is \$500; (3) The amount of the annual occupation tax to manufacture beer (*other than* beer produced by a craft brewery) ranges from \$200 for capacity to manufacture 1 to 100 barrels of beer daily and \$1,600 for capacity to manufacture 500 or more barrels of beer daily; (4) The amount of the annual occupation tax to manufacture beer at a craft brewery is \$500; (5) The amount of the annual retail liquor occupation tax ranges from \$200 to \$600.

⁵³ Kearney Municipal Code section 3-1801.

⁵⁴ Kearney Municipal Code section 3-1803.

⁵⁵ Kearney Municipal Code section 3-1813.

⁵⁶ Kearney Municipal Code section 3-1814.

⁵⁷ Kearney Municipal Code section 3-1815.

⁵⁸ Kearney Municipal Code section 3-1816.

b. Kearney's Occupation Tax on Auctioneers

“The fees for an auctioneer’s license shall be as set forth in the City of Kearney Comprehensive Fee Schedule,”⁵⁹ which provides that the annual occupation tax for an auctioneer is \$100.

c. Kearney's Occupation Tax on Billboard Advertisers

“The annual occupation tax due under the provisions of this Article for the location of billboards upon private property or elsewhere within this City by persons for hire, profit or gain shall be as set forth in the “City of Kearney Comprehensive Fee Schedule”,⁶⁰ which provides that the annual billboard occupation tax is \$100.⁶¹

d. Kearney's Occupation Tax on Cablevision Franchise

“There is hereby imposed upon each person or entity engaged in the cable television business within the City under the terms and provisions of a franchise granted by the City Council, an annual occupation tax as set forth in the City of Kearney Comprehensive Fee Schedule of the *gross revenues* of such person or entity as more fully set forth in a franchise.”⁶² Kearney’s “Comprehensive Fee Schedule” provides that the city’s cable occupation tax rate is 5 percent of gross revenues.⁶³

e. Kearney's Occupation Tax on Circuses

“The daily occupation tax due under the provisions of this Article for the operation of a circus within the City shall be as set forth in the City of Kearney Comprehensive Fee,”⁶⁴ which provides that the *daily* circus occupation tax is \$150.

f. Kearney's Occupation Tax on Concessions

“Each concession not otherwise classified in this Article, such as doll racks or other amusement stands of any kind or description, in the nature of a concession, including each concession connected with any circus, carnival or other exhibition doing business within the City shall pay a daily occupation tax as set forth in the City of Kearney Comprehensive Fee,”⁶⁵ which provides that the *daily* concessions occupation tax is \$50.

⁵⁹ Kearney Municipal Code section 3-1817.

⁶⁰ Kearney Municipal Code section 3-1819.

⁶¹ Kearney Municipal Code section 3-1817.

⁶² Kearney Municipal Code section 3-1821 (emphasis added).

⁶³ See *Appendix B*, citing Kearney Municipal Code section 3-1821.

⁶⁴ Kearney Municipal Code section 3-1822.

⁶⁵ Kearney Municipal Code section 3-1823.

g. Kearney's Occupation Tax on Exhibitions

“The daily occupation tax due under the provisions of this Article for carnivals or exhibitions shall be as set forth in the City of Kearney Comprehensive Fee,”⁶⁶ which provides that the occupation tax for exhibitions ranges from \$50 per day to \$100 per day depending on the type of exhibition (e.g., \$100 per day for exhibitions of inanimate objects).

h. Kearney's Occupation Tax on Junk Dealers

“The annual occupation tax due under the provisions of this Article for each junk dealer, as defined in Section 3-1701 of this Code, shall be as set forth in the City of Kearney Comprehensive Fee Schedule,”⁶⁷ which provides that the annual occupation tax for a junk dealer is \$25.

i. Kearney's Occupation Tax on Hotel Accommodations

“Each person engaged in the business of operating a hotel in the City shall pay an occupation tax in the amount as set forth in the City of Kearney Comprehensive Fee Schedule of the basic rental rates charged per occupied room per night,”⁶⁸ which provides that the annual hotel occupation tax is 2 percent of *basic rental rates*.

“The tax imposed by this article shall be collected by the hotel operator from the occupant of each room to which the tax applies. The tax may be shown as an add-on to the charge for occupancy of the rooms and shall be collectible at the time the lodging is furnished, regardless of when the charge for the occupancy is paid. The operator shall remain responsible for payment of all taxes imposed whether or not the taxes are actually collected from the guests.”⁶⁹

j. Kearney's Occupation Tax on Pawnbrokers

“Every person engaged in business of pawnbrokering shall pay to the Director of Finance and Administration the annual sum as set forth in the City of Kearney Comprehensive Fee Schedule,”⁷⁰ which provides that the annual occupation tax for a pawnbroker is \$50.

⁶⁶ Kearney Municipal Code section 3-1824.

⁶⁷ Kearney Municipal Code section 3-1826.

⁶⁸ Kearney Municipal Code section 3-1830.

⁶⁹ Kearney Municipal Code section 3-1833.

⁷⁰ Kearney Municipal Code section 3-2304.

k. Kearney's Occupation Tax on Telecommunications Service Companies

Kearney's "Comprehensive Fee Schedule" provides that the annual occupation tax on telecommunications service companies is 3 percent.⁷¹

l. Kearney's Occupation Tax "Comprehensive Fee Schedule"

Appendix B contains a copy of Kearney's "Comprehensive Fee Schedule," effective October 1, 2011.⁷² (Occupation tax rates and fees are listed on page 1 of the Comprehensive Fee Schedule under the heading "Administration".)

D. Occupation Taxes in Cities of the Second Class & Villages: Stromberg, NE

1. Statutory Authority to Impose Such Taxes

Neb. Rev. Stat. section 17-525 governs the authority of cities of the second class and villages to impose occupation taxes: "Second-class cities and villages shall have power to raise revenue by levying and collecting a license tax on any occupation or business within the limits of the city or village, and regulate the same by ordinance. All such taxes shall be uniform in respect to the classes upon which they are imposed; *Provided*, all scientific and literary lectures and entertainments shall be exempt from such taxation, as well as concerts and other musical entertainments given exclusively by the citizens of the city or village."⁷³

2. Twelve Occupation Taxes Imposed by the City of Stromsberg, NE

Stromsberg Municipal Code, Article 6, section 10-601 sets forth the following list of twelve business occupations and the city's occupation taxes that are imposed on such businesses:

"For the purpose of raising revenue an occupation tax is hereby levied on the following businesses:

- Class A retailer's license, beer only, (on sale only), per year.....\$ 12.50
- Class B retailer's license, beer only, (off sale only), per year.....\$ 12.50

⁷¹ **Appendix B**, "Comprehensive Fee Schedule," p. 1, citing Kearney Municipal Code section 3-2001.

⁷² "Comprehensive Fee Schedule," p. 1, Kearney City Council Resolution No. 2001-91 (eff. Oct. 1, 2011) (<http://www.cityofkearney.org/index.aspx?NID=521>).

⁷³ Neb. Rev. Stat. section 17-525. Source Laws 1879, § 69, VIII, p. 212; Laws 1881, c. 23, § 8, VIII, p. 174; Laws 1885, c. 20, § 1, VIII, p. 165; Laws 1887, c. 12, § 1, VIII, p. 293; R.S.1913, § 5114; C.S.1922, § 4287; C.S.1929, § 17-436; R.S.1943, § 17-525.

Class D retailer's license, alcoholic liquors, including beer, (off sale only), per year.....	\$ 75.00
Class H retailer's license, alcoholic liquors, including beer, (on sale only), issued to nonprofit corporation, per year.....	\$ 25.00
Class J retailer's license, beer and wine only, (on sale only), per year	\$ 37.50
Class K retailer's license, wine only, (off sale only), per year	\$ 62.50
Class M retailer's license, bottle club, per year	\$250.00
Special designated permit for liquor license holders.....	\$10.00
Vendor trucks, per year	\$100.00
Salesmen, door-to-door, per year	\$100.00
Fire insurance companies, per year	\$5.00
Telephone companies, per year	\$400.00

Nothing herein shall be construed to apply to any person or business that sells directly to merchants or that is permanently located within the Municipality, with the exception of alcoholic liquor licenses.”⁷⁴

V. Business & Occupation (B&O) Taxes Imposed by Cities in Washington

“In addition to the state B&O tax, many Washington cities also assess a local B&O tax. There is *no* connection between the state and local B&O taxes.”⁷⁵

Appendix C contains a copy of the local B&O tax rates (effective January 1, 2011), levied by cities in Washington State that impose their own B&O taxes on manufacturers, retailers, service providers, and wholesalers.⁷⁶

⁷⁴ Stromsberg Municipal Code, Article 6, section 10-601.

⁷⁵ “What about city and county B&O requirements?”, Washington Department of Revenue (emphasis in original) (<http://dor.wa.gov/content/QuestionsAndAnswers/article.aspx?id=10343&cNode=5K7170>). For additional information about municipal B&O taxes in Washington, visit the web site of the Municipal Research and Services Center of Washington, which includes a link to a “model” municipal B&O tax ordinance and links to nine municipal ordinances (including the cities of Seattle and Tacoma) that deviate from the model ordinance: <http://www.mrsc.org/Subjects/Finance/B-Otax.aspx>.

⁷⁶ “Local Business (B&O) Tax Rates,” eff. January 1, 2011, Assoc. of Washington Cities (April 18, 2011) (<http://www.awcnet.org/Portals/0/Documents/Resources/botaxrates.pdf>). *Appendix C* contains a copy.

Local B&O tax rates can differ depending on the taxpayer's business classification. The most common classifications include manufacturing, retailing, service businesses, or wholesale businesses, but local B&O tax rates can apply to business classifications other than manufacturing, retailing, service businesses, and wholesale businesses.⁷⁷

For example, the City of Seattle imposes its B&O tax on manufacturers at a rate of 0.00215, on retailers at a rate of 0.00215, on service businesses at a rate of 0.00415, and on wholesalers at a rate of 0.00215. Due to voter approval of a B&O tax rate in excess of the statutory B&O tax rate limit, each of Seattle's B&O tax rates exceed the statutory B&O municipal tax rate limit.⁷⁸

Exemptions, deductions, and other exceptions from local B&O taxes can apply in certain circumstances.⁷⁹

In 2003, the Washington Legislature enacted Engrossed House Bill 2030 (EHB 2030, codified at Revised Code of Washington section 35.102),

which provided for a more uniform system of municipal business and occupation (B&O) taxes. It directed the Association of Washington Cities (AWC), with input from the business community, to adopt a model ordinance to serve as a foundation for municipal ordinances that impose a B&O tax on gross receipts. . . . In addition to the model ordinance provisions, EHB 2030 required a new system for the allocation and apportionment of gross income subject to a municipal B&O tax. Apportionment refers to a method of dividing the tax base among the various jurisdictions in which the taxpayer engages in business. Most apportionment laws involve the use of a formula in which the division of a business' income between jurisdictions is based on one or more factors relating to sales income, property value, and payroll amounts. The effect is that a jurisdiction may impose a tax only on a portion of the total income earned by a business that is attributed to the jurisdiction. Allocation refers to the assignment of income to a single jurisdiction.⁸⁰

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ "Local Business (B&O) Tax Rates," *unnumbered footnote*, Association of Washington Cities (April 18, 2011) (<http://www.awcnet.org/Portals/0/Documents/Resources/botaxrates.pdf>).

⁸⁰ *Municipal Business and Occupation Tax Study of Potential Net Fiscal Impacts (Allocation and Apportionment Study)*, p. 1, Washington Department of Revenue (November 2005). "After examining potential net fiscal impacts and proposals for mitigating adversely affected local jurisdictions, the Department finds: [1] That the allocation and apportionment provisions contained in EHB 2030 will result in an estimated revenue loss of \$23.3 million in the first year for 39 cities that impose a municipal B&O tax. [2] Several options exist for mitigating the potential losses. Eight proposals are presented in this report. They range from repealing section 13 of EHB 2030 (apportionment) to providing full and permanent state-funded compensation using state resources. Proposals for local funding sources for mitigation and centralized administration are also presented." [Id., p.1.]

The new law:

requires the 39 cities with local B&O taxes to adopt allocation and apportionment provisions as part of an updated city B&O tax model ordinance by January 1, 2008. (RCW 35.102.130) . . .

Under the new change, specific rules for allocating and apportioning revenues to jurisdictions in which it engages in business for tax purposes will apply and will vary depending on the classification under which revenue is reported:

Allocation:

- Manufacturing/Extracting/Retail Services: allocated to the location where the activity takes place.
- Retail Sales: the activity takes place where delivery to the buyer occurs (similar to state sales tax changes to “destination-based sourcing” that take effect on July 1, 2008).
- Wholesale Sales: the activity takes place where delivery to the buyer occurs.
- Royalties from the Granting of Intangible Rights: allocated to the commercial domicile of the taxpayer.

Apportionment:

Services and Other: apportioned to a city by multiplying service income by a payroll factor (based on the payroll within the jurisdiction), plus the service-income factor (based on the income producing activity attributable for tax purposes within the jurisdiction), divided by two: Total services income x (Payroll Factor + Service-Income Factor)/2.”⁸¹

The City of Black Diamond repealed its B&O tax effective January 1, 2008, and the City of Buckley repealed its B&O tax effective January 1, 2007.⁸²

VI. Do any States have Statutory Occupation Tax Rate Limitations? Yes.

A. Nebraska

Currently, Nebraska does not impose any statutory limitations on occupation tax rates imposed by municipalities. However, that will change beginning January 1, 2013.

⁸¹ “City Business & Occupation (B&O) Tax Required Updates Effective January 1, 2008,” Association of Washington Cities (October 2007).

⁸² “Local Business (B&O) Tax Rates,” unnumbered footnote, Association of Washington Cities (April 18, 2011) (<http://www.awcnet.org/Portals/0/Documents/Resources/botaxrates.pdf>).

Laws 2011, LB 165, establishes tax base and tax rate limitations on telecommunications occupation taxes imposed by Nebraska municipalities. Beginning January 1, 2013, the rate of a municipality's telecommunications occupation tax cannot exceed 6.25 percent, unless a proposed telecommunications occupation tax rate increase is approved by voters at a primary or general election at which members of the municipality's governing body are elected or at a special election held within the municipality. LB 165 permits a voter-approved telecommunications occupation tax rate to exceed 6.25 percent, but only in increments of 0.25 percent at any one election held for that purpose. Also beginning January 1, 2013, a municipality's telecommunications occupation tax can be imposed only on "the receipts from service", as defined in Neb. Rev. Stat. section 77-2703.04 (7) (aa). That means such a tax cannot be imposed on—among other things—tangible personal property (e.g., telecommunications equipment), Internet access, and digital products delivered electronically (e.g., software, music, video, reading material, and ringtones).

Additionally, LB 542 (2011) proposes to establish municipal occupation tax rate limitations. LB 542, which is currently being held by the Revenue Committee, proposes the following tax rate limitation on all municipal occupation taxes:

"[T]he rate of any such tax shall not exceed XX percent of the tax base of the occupation subject to such tax, including, but not limited to, a tax levied on the gross receipts of a restaurant, a tax levied on the number of seats in a theater, a tax levied on the price per unit of merchandise sold through a vending machine, a tax levied on the number of parking spaces in a drive-in theater, and a tax levied on the number of parking spaces in a parking garage."⁸³

B. Washington

The following material explains Washington's municipal business and occupation tax rate limitations, and other limitations on the imposition of municipal business and occupation taxes in the State of Washington:

"GENERAL BUSINESS ACTIVITIES: RCW 35.21.710 sets a maximum rate of 0.2 percent for city taxes on business activities that are measured by gross receipts or gross income. However, if a city levied a higher rate on January 1, 1982, the rate need not be reduced, but future increases were limited to a maximum of 10 percent (i.e., 0.22 percent) and the amount that the rate could be increased annually was 2 percent (i.e., 0.004 percent per year). The city may increase the tax rate above these maximums if approved by the voters of the jurisdiction (RCW 35.21.711).

⁸³ LB 542 (2011), sections 1 through 4.

UTILITIES: RCW 35.21.870 sets a maximum rate of 6 percent on electrical, natural gas, steam energy, and telephone businesses, unless a higher rate is approved by the voters. Cities that levied a higher rate on April 20, 1982, were required to reduce the rate to 6 percent over a ten-year period, unless the higher rate was approved by the voters. There is no limit on the rate for other utilities, e.g., garbage, water, and sewer services.

OTHER REQUIREMENTS AND RATE LIMITS:

- Any license fee or tax on gross receipts/income that is imposed on retailing businesses must be levied at a single and uniform rate (RCWs 35.21.710 and 35A.82.050).
- Competitive telephone service must be taxed as a retailing activity which is limited to a rate of 0.2 percent (RCW 35.21.710 and 35A.82.050).
- Other telephone businesses operating within the city, if measured by gross receipts/income, must be taxed at a uniform rate which can be as high as 6 percent. The tax may apply to 100 percent of intrastate toll service. If the tax is levied on charges to other telecommunications companies for connection fees, switching charges, access charges, interstate service, or network telephone service purchased for resale, such tax must be at the same rate which applies to competitive telephone service, i.e., a maximum of 0.2 percent. (RCWs 35.21.712, .714 and .715 and 35A.82.055, .060 and .065)
- Any license fee or tax on financial institutions is limited to the rate which applies to other service activities and the definitions, deductions, and exemptions which pertain to the state B&O tax on financial institutions must also apply for the municipal tax (RCW 82.14A.010). The Department of Revenue is required to promulgate a rule defining the uniform apportionment of income of financial institutions for purposes of the local business taxes (RCW 82.14A.020); there are four rules which address this subject: WAC 458.28.010 – 458.28.040.
- Income of trucking firms is subject to allocation for purposes of determining the appropriate measure of local business taxes (RCW 35.21.840-.850).
- Cities may not impose a gross receipts tax on intellectual property creating activities. A city may tax income received from royalties, but only if the taxpayer is domiciled within the same city (RCW 35.21.855).
- Cities may tax internet service providers but at a rate no higher than the general service rate (RCW 35.21.717).

VOTER APPROVAL: Any new or increased municipal business and occupation tax is subject to a referendum procedure (RCW 35.21.706). This allows the filing of a referendum petition to challenge a new or increased tax within seven days of

the imposing ordinance. After the ballot title is prepared, the petitioner has 30 days to collect signatures. If at least 15 percent of the voters of the jurisdiction sign the petition, then the ordinance imposing or increasing the business tax will appear on the next ballot for approval by the electorate.”⁸⁴

VII. The Nebraska Constitution’s Limitations on Imposition of Occupation Taxes by Home Rule Municipalities

A dimension of complexity arises when trying to determine the constitutional validity of an occupation tax imposed by a home rule municipality in Nebraska.

A. The Nebraska Constitution Allows Creation of Home Rule Municipalities

“Any city having a population of more than five thousand (5000) inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state. . . .”⁸⁵

B. How Many Cities in Nebraska Have Population Greater Than 5,000?

“The 2010 Census shows 32 cities in Nebraska have more than 5,000 people, the population some believe is needed for a city to sustain growth.”⁸⁶ However, not all of those 32 cities are home rule municipalities.

C. Nebraska Case Law Limitations on the Powers of Home Rule Municipalities

Nebraska case law shows that it is important to distinguish matters of “statewide concern” from matters of “local concern” when determining whether a home rule municipality has exceeded the Nebraska Constitution’s limitations on the power of home rule municipalities to impose an occupation tax.

The purpose of the home rule charter provisions of the Nebraska Constitution is to render cities as nearly independent as possible of state legislation, subject to the general public policy of the state.⁸⁷

A home rule charter must be consistent with and subject to the Constitution and laws of the state.⁸⁸

⁸⁴ Revised Code of Washington section 35-102 (emphasis added) (http://dor.wa.gov/docs/reports/2010/Tax_Reference_2010/29localbando.pdf).

⁸⁵ Nebraska Constitution, Article XI, Section 2 (emphasis added).

⁸⁶ “Committee to study what to do about shrinking of rural Nebraska population,” *Lincoln Journal Star* (July 22, 2011) (<http://journalstar.com/news/state-and-regional/60007fd1-9d4f-54b5-9f75-396934c9416b.html>).

⁸⁷ *State ex rel. Fischer v. City of Lincoln*, 137 Neb. 97, 288 N.W. 499 (1939).

As to matters of “local concern,” cities are independent of state legislation and general laws must yield to provisions of a home rule municipality’s charter.⁸⁹

A general law of “statewide concern” takes precedence over a conflicting provision of a city’s home rule charter.⁹⁰

VIII. Summary and Recommendations

This 2011 Revenue Committee interim study report has primarily examined several issues pertaining to the imposition of occupation taxes by city governments in Nebraska.

This report provides a general definition of occupation taxes and a fundamental framework useful for examining any type of tax by focusing on: (1) The nature or classification of such taxes; (2) The subject or subjects of such taxes; (3) The measure or measures of such taxes; (4) The rate or rates of such taxes, and whether statutory tax rate limitations exist; (5) The taxpayer subject to such taxes; and (6) Constitutional limitations on the imposition of such taxes.

This report examines municipal occupation taxes in Nebraska, including identifying the statutory authority of cities and villages to impose such taxes and the constraints imposed by the Constitution of Nebraska on the power of cities and villages to impose such taxes.

Specifically, this report examines the statutory authority of cities of the metropolitan class, cities of the primary class, cities of the first class, and cities of the second class and villages to impose occupation taxes. More specifically, this report examines—by way of example—occupation taxes imposed by the City of Omaha (a city of the metropolitan class), the City of Lincoln (a city of the primary class), the City of Kearney (a city of the first class), and the City of Stromsberg (a city of the second class).

This report also examines whether any states have statutory occupation tax rate limitations and it finds that Nebraska has such a limitation with respect to occupation taxes imposed on the telecommunications industry and that Washington has such a limitation with respect to all occupation taxes imposed by municipalities in that state.

The Nebraska Constitution's limitations on imposition of occupation taxes by home rule municipalities—and related case law—are also set forth in this report.

The Revenue Committee did not make any recommendations with respect to LR 220.

⁸⁸ *Retired City Gov. Emp. Club of Omaha v. City of Omaha Emp. Ret. Sys.*, 199 Neb. 507, 260 N.W.2d 472 (1977); *City of Millard v. City of Omaha*, 185 Neb. 617, 177 N.W.2d 576 (1970); *State ex rel. City of Grand Island v. Johnson*, 175 Neb. 498, 122 N.W.2d 240 (1963); *Axberg v. City of Lincoln*, 141 Neb. 55, 2 N.W.2d 613 (1942).

⁸⁹ *Sandell v. City of Omaha*, 115 Neb. 861, 215 N.W. 135 (1927).

⁹⁰ *Nagle v. City of Grand Island*, 144 Neb. 67, 12 N.W.2d 540 (1943).

APPENDIX A



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Occupation Taxes

Recently a number of cities have adopted occupation taxes on a variety of business activities. The Department has prepared the following information to address the many questions and issues related to these types of taxes.

What is an occupation tax?

To generate revenue, any class of city may collect a "privilege or license tax" on an occupation or business within its boundaries. This is commonly referred to as an occupation tax. The tax must be applied uniformly and fairly to the types of businesses on which it is imposed. The most common types of businesses affected are hotel operators, car rental companies, telecommunications providers, restaurants, and bars.

NOTE: There are two common references to "occupation tax" in Nebraska law. The information in this document relates only to city-imposed occupation taxes on certain types of products or services offered by specific business types or occupations. The second type of occupation tax is administered by the Secretary of State and is imposed on corporations registered to do business in Nebraska. Information on this occupation tax on corporations is available from the Secretary of State's office.

Who can impose an occupation tax?

Any city or village may impose an occupation tax under Nebraska law:

Metropolitan Class Cities	Neb. Rev. Stat. § 14-109
Primary Class Cities	Neb. Rev. Stat. § 15-202
First Class Cities	Neb. Rev. Stat. § 16-205
Second Class Cities	Neb. Rev. Stat. § 17-525

Who sets the occupation tax rate?

The occupation tax rate is set by the city imposing it. The rate may vary from city to city, and by type of occupation or business activity within the city. This may result in multiple rates on different activities in the same city at the same time.

Who pays the occupation tax?

The occupation tax is imposed on the business, similar to income taxes and property taxes. However, many cities allow retailers to itemize the occupation tax on their customer's bill or invoice as a separate line item.

How is the occupation tax paid?

The business pays the occupation tax directly to the city on forms provided by the city.

Depending on the ordinance or resolution enacted by the city, a retailer may:

1. Choose to itemize the occupation tax by showing it on the customer's bill;
2. Choose to absorb the occupation tax; or
3. Raise prices to recoup the occupation tax without separately itemizing it on the customer's bill.

When is the occupation tax subject to state or local sales taxes?

If a retailer selling items or services subject to sales tax chooses to show the occupation tax on the customer's bill, the occupation tax is part of gross receipts. In this case, the occupation tax must be included in the sales price **before** calculating the state and any applicable local sales tax.

A business is not allowed to combine the occupation tax rate with the sales or lodging tax rate and charge its customers one flat rate.

Why is this not considered "a tax on a tax?"

Collecting sales tax on the occupation tax is not considered a "tax on tax" because the occupation tax is simply another cost of doing business. It is no different than income, property, or other business or license taxes which are also considered costs of doing business. Stating the occupation tax on the customer's invoice does not impose it on the customer. Whenever a retailer itemizes its costs of doing business for the customer, these amounts are still part of gross receipts subject to sales tax. See the definition of "gross receipts" in Sales Tax Regulation 1-007.01. Also see the definition of "sales price" in Neb. Rev. Stat. § 77-2701.35(3)(c), which states in part that the sales price does not include taxes "legally imposed directly on the consumer." This is explained in more detail in the next question and answer.

What is the difference between sales tax and occupation tax?

Sales tax is imposed by the state and certain local jurisdictions directly on the consumer (customer). The state sales tax is enacted by the Legislature. A local sales tax may be adopted only after a vote of the residents of the local jurisdiction seeking to impose the tax. Except where specified by law, retailers of taxable items and services are required to separately state and collect all state and local sales taxes from the customer, and remit the sales tax directly to the Nebraska Department of Revenue.

Occupation tax is imposed by a city directly on an occupation or business activity. The rate is set by the city resolution or ordinance. It does not require a vote by the residents of the city. Businesses pay the occupation tax directly to the city even when they itemize or otherwise recoup the occupation tax from the customer.

Example 1 – Meal-only Restaurant Bill

A customer purchases a meal at a restaurant in a city with a 2.5% occupation tax on restaurants. The calculation of the invoice is shown below:

Meal	\$ 50.00
Occupation Tax (2.5%)	+ 1.25 (remit to City)
Subtotal	\$ 51.25
7% Sales Tax (State 5.5% and City 1.5%)	+ 3.59 (remit to Nebraska Department of Revenue)
Total	\$ 54.84

APPENDIX B

CITY OF KEARNEY
COMPREHENSIVE FEE SCHEDULE (Exhibit A)
(Approved by City Council on August 9, 2011, Resolution No. 2011-91)

Fee Description	Corresponding City Code Section	Effective October 1, 2011
Administration		
Copying fee:		
Audio tape (per tape)		6.00
Video tape (per tape)		25.00
Written documents or records (per double sided page)		.25
✓ Liquor occupation tax to manufacture alcohol and spirits	3-1816	2,000.00 ✓
✓ Liquor occupation tax to manufacture beer and wine or to operate a farm winery or craft brewery (annual):		
Manufacture of beer, excluding beer produced by a craft brewery:		
1 to 100 barrel daily capacity	3-1816	200.00 ✓
100 to 150 barrel daily capacity	3-1816	400.00 ✓
150 to 200 barrel daily capacity	3-1816	700.00 ✓
200 to 300 barrel daily capacity	3-1816	1,000.00 ✓
300 to 400 barrel daily capacity	3-1816	1,300.00 ✓
400 to 500 barrel daily capacity	3-1816	1,400.00 ✓
500 barrel daily capacity, or more	3-1816	1,600.00 ✓
Operation of a craft brewery	3-1816	500.00 ✓
Manufacture of wines	3-1816	500.00 ✓
Operation of a farm winery	3-1816	500.00 ✓
Alcoholic liquor wholesale license	3-1816	1,500.00 ✓
Beer wholesale license	3-1816	1,000.00 ✓
✓ Liquor occupation tax - retail (annual):		
Class A retail beer, on sale	3-1816	200.00 ✓
Class B retail beer, off sale	3-1816	200.00 ✓
Class C retail liquor, on/off sale	3-1816	600.00 ✓
Class D retail liquor/beer, off sale	3-1816	400.00 ✓
Class I retail liquor, on sale	3-1816	500.00 ✓
Special designated liquor license (per day)	3-1816	80.00 ✓
Advertisement fee for all liquor license applications		13.00
City code violation (misdemeanor) - no other specific penalty	1-111	300.00
City code violation (infraction) - no other specific penalty - first offense	1-112	100.00
City code violation (infraction) - no other specific penalty - second offense	1-112	100.00 - 300.00
City code violation (infraction) - no other specific penalty - third offense	1-112	200.00 - 500.00
✓ Auctioneers occupation tax (annual)	3-1817	100.00 ✓
✓ Auctioneers occupation tax (per day)	3-1817	10.00 ✓
✓ Auction permit for sales in residential areas	3-1818	15.00 ✓
✓ Billboard occupation tax (per year)	3-1819	100.00 ✓
* Cable occupation tax (on gross revenues)	3-1821	5% *
✓ Circus/carnival permit	3-1405	25.00 ✓
✓ Circus occupation tax (per day)	3-1822	150.00 ✓
✓ Circus/carnival concession occupation tax (per day)	3-1823	50.00 ✓
✓ Carnival or exhibition occupation tax (per day):		
Carnivals	3-1824	150.00 ✓
Exhibitions	3-1824	50.00 ✓
Exhibitions as defined in section 3-1401 of the City Code	3-1824	100.00 ✓
Exhibitions of inanimate objects	3-1824	100.00 ✓
Other public amusements or exhibitions	3-1824	100.00 ✓
✓ Junk dealer occupation tax (per year)	3-1826	25.00 ✓
✓ Telecommunications services companies occupation tax	3-2001	5% *
✓ Hotel occupation tax (on basic rental rates)	3-1830	2% *
✓ Natural gas company occupation tax (per therm of gas delivered)	3-2101	.0350 *
✓ Pawnbroker occupation tax (annual)	3-2304	50.00 ✓
✓ Tattoo license application fee	3-2502	25.00 ✓
✓ Tattoo license fee (annual)	3-2503	100.00 ✓
Telecommunications:		
Registration fee to be paid at the time of the filing of registration information	3-2867	100.00
License application fee to be paid at the time of filing a license application	3-2867	1,000.00
Franchise application fee to be paid at the time of filing a franchise application	3-2867	1,000.00
License or franchise amendment fee to be paid at the time of filing a supplementary application	3-2867	100.00
Permit and plan review fee to be paid at the time of the filing of an application for permit to construct telecommunications facilities subject to adjustment upon completion of plan review (per foot based on total length of the project)	3-2867	.07
Public right-of-way access fee (one time only) to be paid prior to installation of construction of telecommunications facilities on a public way	3-2867	100.00
Right-of-way for arterial or collector streets defined by City Code and shown on the State Functional Classification Map (per foot, one time)	3-2867	5.00

APPENDIX C

Local Business (B&O) Tax Rates
Effective January 1, 2011

City	County	Phone #	Manufacturing Rate	Retail Rate	Services Rate	Wholesale Rate
Aberdeen	Grays Harbor	(360) 533-4100	0.002	0.003 e	0.00375 e	0.003 e
Algona	King	(253) 833-2897	0.00045	0.00045	0.00045	0.00045
Bainbridge Island	Kitsap	(206) 842-7633	0.001	0.001	0.001	0.001
Bellevue	King	(425) 452-6851	0.001496	0.001496	0.001496	0.001496
Bellingham	Whatcom	(360) 676-6900	0.0017	0.0017	0.0044 e	0.0017
Bremerton	Kitsap	(360) 478-5290	0.0016	0.00125	0.002	0.0016
Burien	King	(206) 241-4647	0.0005	0.0005	0.0005	0.0005
Cosmopolis	Grays Harbor	(360) 532-9230	0.001487	0.001487	0.001487	0.001487
Darrington	Snohomish	(360) 436-1131	0.00075	0.00075	0.00075	0.00075
Des Moines	King	(206) 878-4595	0.002	0.002	0.002	0.002
DuPont	Pierce	(253) 964-8121	0.001	0.001	0.001	0.001
Everett	Snohomish	(425) 257-8601	0.001	0.001	0.001	0.001
Everson	Whatcom	(360) 966-3411	0.002			0.002
Granite Falls	Snohomish	(360) 691-6441	0.002			0.002
Hoquiam	Grays Harbor	(360) 532-5700	0.002	0.002	0.002	0.002
Ilwaco	Pacific	(360) 642-3145	0.002	0.002	0.002	0.002
Issaquah	King	(425) 837-3054	0.0008	0.0008	0.001	0.0008
Kelso	Cowlitz	(360) 423-0900	0.001	0.001	0.002	0.001
Lacey	Thurston	(360) 491-3214		0.001	0.002	
Lake Forest Park	King	(206) 368-5440	0.002	0.002	0.002	0.002
Long Beach	Pacific	(360) 642-4421	0.002	0.002	0.002	0.002
Longview	Cowlitz	(360) 442-5000	0.001	0.001	0.002	0.001
Mercer Island *	King	(206) 236-5300	0.001	0.001	0.001	0.001
North Bend	King	(425) 888-1211	0.002	0.002	0.002	0.002
Ocean Shores	Grays Harbor	(360) 289-2488	0.002	0.002	0.002	0.002
Olympia	Thurston	(360) 753-8327	0.001	0.001	0.002	0.001
Pacific	King	(253) 833-2856	0.002	0.002	0.002	0.002
Port Townsend	Jefferson	(360) 379-4409	0.002	0.002	0.002	0.002
Rainier	Thurston	(360) 446-2265	0.002	0.002	0.002	0.002
Raymond	Pacific	(360) 942-3451	0.002	0.002	0.002	0.002
Roy	Pierce	(253) 843-1113	0.001	0.002	0.002	0.001
Ruston	Pierce	(253) 759-3544	0.0011	0.00153	0.002	0.00102
Seattle	King	(206) 684-8300	0.00215 v	0.00215 v	0.00415 v	0.00215 v
Shelton	Mason	(360) 426-4491	0.001	0.001	0.001	0.001
Snoqualmie	King	(425) 888-1555	0.0015	0.0015	0.0015	0.0015
Tacoma	Pierce	(253) 591-5252	0.0011	0.00153	0.004 e	0.00102
Tumwater	Thurston	(360) 754-5855	0.001	0.001	0.002	0.001
Westport	Grays Harbor	(360) 268-0131	0.0025 e	0.005 e	0.005 e	0.0025 e
Yelm	Thurston	(360) 458-3244	0.001	0.002	0.002	0.001

Average 0.00148 0.00160 0.00199 0.00150

(v) = voter approved increase above statutory limit

(e) = rate higher than statutory limit because rate was effective prior to January 1, 1982 (i.e., grandfathered).

* Mercer Island's B&O tax rate is still .001 with a gross receipts annual exemption amount of \$150,000 (i.e. only gross receipts in excess of \$150,000 are subject to the .001 tax rate).

NOTE: Tax rates may apply to businesses categories other than those above. Exemptions, deductions, or other exceptions may apply in certain circumstances. Contact the city finance department for more information.

NOTE: Black Diamond repealed its B&O tax effective January 1, 2008. Buckley repealed its B&O tax effective January 1, 2007.