



THE ANATOMY OF
**RESOLVING
STATE TAX
MATTERS**

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State & Local Tax and Incentives Resolution Protocol

This Protocol has been developed and used by us over the past couple decades based on the key factors for achieving the best results in State and Local Tax and Incentive audits and protests/appeals.

Legal Representation. Attorneys are trained to cut to the root of the real issue and save the time, expense and potential harm of going down the wrong path. Determine both when an attorney's insight would be helpful and also when in the process the Nebraska Rules of Practice require a taxpayer to engage an attorney.

Engagement. Specify the scope of the engagement in the Engagement Letter - to be sure client goals are clear.

Determine Internal Team and External CPA. Successful results are best achieved by a Team. This Team should consist of the right members of a Company's Internal Team, as well as the Company's regular Legal Counsel, outside CPA, and a State & Local Tax & Incentives Attorney.

Begin With the End in Mind. Know where you want to end up before beginning - and determine the best path to get there.

Start With the Statute. Tax and incentive results are always dependent on the actual, very precise (or imprecise) words of the actual statute, which the Legislature chose to include or exclude. Results are not dependent upon the Department of Revenue's opinion of the statute or the Department's wish as to what the statute said or didn't say.

Determine and Understand the Critical Facts. Unsuccessful cases often get bogged down in facts that are not important or miss facts that are important. Determine the facts needed to win and the facts that actually exist.

Proper Attitude. Determine from the beginning the proper attitude towards the position in the case and reflect this in all of the discussions and analysis.

Determine Other Relevant Law. Determine what regulations and case law exist on point and how these impact the result or are distinguishable.

Understand the Department's Rationale. To effectively rebut the interpretation of the Department of Revenue, fully understand the rationale and analysis that led the Department to that interpretation - and precisely where the wrong view of the facts or the law led it astray.

View the Department's Rulings Properly. Generally, the department's revenue rulings are not binding on taxpayers. They don't constitute the law. They constitute the department's opinion (on which taxpayers can generally rely).

Follow the Rules of Statutory Construction. When disputing the Department's interpretation of a statute, knowing and applying the accepted rules of statutory construction is critical. A faulty statute interpretation usually violates one of these rules.

Statute of Limitations Review And Extension Strategy. Determine when to keep the statute of limitations open or let it expire.

Respect the History. Legislative history (such as from the Nebraska Legislature's process and debate) can often be a good source of knowledge regarding the right way to interpret an unclear statute. However, like all tools, legislative history has limitations, too. This history must be used properly.

Protect the Attorney - Client Privilege. Take care to ensure that the attorney-client privilege, when applicable, is not lost through any of the ways this can be lost. And know the difference between this and the CPA privilege.

Respect Company Time. Respect the investment of time by the Company personnel who are assisting in the defense.

Retain Records and Keep the Evidence Admissible. Facts can often be proven multiple ways. Care needs to be taken to ensure that evidence documenting a fact will be available and admissible at each stage, whether or not a formal Hearing is needed.

Legal Analysis. Be precise, thorough, and truthful in how the legal analysis is developed, written, and presented.

Professionalism. Be professional and respectful in all discussions with everyone involved in the case.

Convincing Testimony. Care should be taken to ensure the right people are available to testify—and that any witnesses can provide clear and convincing testimony. Whenever possible, someone with firsthand knowledge should be available.

Nontax Principles. Various legal principles that exist in tax and nontax areas of the law can often be applied and should always be considered.

Presumptions. Know what presumptions and burdens of proof apply.

Don't Forget the Experts. Expert testimony may be needed to prove certain key facts. Identify where experts may be needed and secure the right experts in that case.

Play the "Devil's Advocate". Someone on the Tax Defense Team should always play the part of the contrarian—no matter how solid or weak your issue or case may seem. This helps uncover blind spots and helps ensure both the strengths and weaknesses of the issue or case are properly vetted and considered.

Be Visual. Realize that not everyone perceives in the same way. Always determine and prepare the best one-page summary that visually demonstrates the case. A one-page visual is important at each stage.

Respect Cost/Benefit. Always estimate the cost (in-house and outside) to achieve a win or favorable settlement—at each stage of the process. Comparing this to the amount at issue will allow for informed judgment about whether and how to advance or settle a position.

Prevent Repeats. Look at what steps are needed to avoid a repeat of the same issue in future years.

Other Unique Considerations. Determine what may be unique to the particular case and do what's needed to address it.



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The Anatomy of Resolving State Tax Matters

As many people realize, State and Local Taxes are a significant percentage of the overall taxes paid by companies and individuals. State and Local governments in the United States annually collect about \$1,500,000,000,000 in state and local individual income, corporate income, sales and property taxes. This is equal to approximately 40% of the annual amount of U.S. income taxes collected by the federal government.

In light of the importance of State and Local Taxes, we have prepared this guide to address the principal Nebraska State and Local Tax issues that we have been working on with our clients and their in-house and outside tax professionals. More importantly, we'll discuss what you can do about these issues.

Before, During and After The Audit

As with all tax matters, State and Local taxes offer the opportunity to choose to plan ahead or to choose to not plan ahead. Planning ahead usually results in the better outcome. In either situation, all taxpayers are subject to being audited. All Audits are either resolved at the Audit level or resolved on appeal. (While this guide focuses on Audits, the same points generally apply to Refund Claims and Amended Returns).

This guide first looks at planning opportunities that can occur Before the Audit. This is followed by certain best practices During the Audit and then After the Audit (i.e. the Appeal).

Before The Audit: Planning Ahead

Achieving the intended tax result is largely dependent on the planning and strategies deployed long before the Department of Revenue ever shows up for the Audit. Below are several, selected topics which we are addressing during the life of a business or individual, and which we are also seeing in Audits and Appeals, whether or not properly or fully addressed early on.

Sales Tax on Software Development

Problem: The Department of Revenue won't recognize that custom software developed by outside firms for a company is exempt from tax, unless the software staff developers meet a 3 factor test to be treated as "temporary employees" of the company for sale tax purposes. This normally arises in staff augmentation contracts. NDR Rev. Rul. 1-02-1.

What To Do: If a company very precisely includes the 3 factors for temporary employees in its software development agreement, it may avoid Nebraska sales tax on that development. Audits and Appeals usually center around proving the agreement complies and that various contract terms or company practices don't contradict this. The 3 factor test (ownership, liability and control) is actually a "safe harbor", which enables other factors and legal grounds to apply if this harbor is not met.

Tax on Cloud Computing / Data Center Services

Problem: The Department of Revenue now alleges that sales tax is due on a part of cloud computing charges, because otherwise exempt cloud computing is protected by certain levels of software security measures.

What To Do: If cloud service contracts are carefully drafted, a company may reduce or eliminate the portion of cloud computing charges that the Department alleges are subject to the sales tax on security services. On Audit or Appeal we are addressing the legal position that security, which is an integral part of the cloud computing or data center service, should not be parsed and taxed.

Nebraska Residency For Income Tax Purposes

Problem: The Department of Revenue routinely follows individuals who move outside of Nebraska to attempt to classify these persons as still being Nebraska taxable residents.

What To Do: If your client intends to move out of Nebraska to nonresident status, the 12 principal factors for determining a person's resident or nonresident status should be addressed and documented during and after the move.

Frequently individuals will want to retain certain Nebraska connections (such as home or business ownership and frequent visits) which the Department uses against you.

On Audit or Appeal, we usually find the taxpayer hasn't met all of the 12 factors or kept the documents to best prove this, so this often becomes a matter of legal positioning and settlement.

Nebraska Tax For Trusts Administered Elsewhere

Problem: Nebraska's statutes impose tax on irrevocable trusts created by a Nebraska resident. This may not be constitutional for trusts administered outside Nebraska.

What To Do: If a trust's only contact with Nebraska was the residence of a grantor, the trust may not be subject to Nebraska income tax. This is best handled when the trust is designed and set up, which best supports the legal analysis upon Audit or Appeal.

Qualification For Nebraska's Capital Gain Exclusion

Problem: The Department of Revenue is challenging the qualification for this exclusion in a number of situations, including pre-sale attempts to qualify, or when corporate stock is placed into an LLC, partnership or trust or when stock is sold under Sec. 338(h)(10) of the federal tax code.

What To Do: The selling owner needs to meet the statutory requirements at the time of sale. If an owner wants to transfer stock into an LLC, partnership or trust, the potential disqualification needs to be addressed before the stock is transferred. The case law provides debatable positions for Audit or Appeal when the ownership isn't clean.

Nebraska Incentive Programs (with approximate annual statewide funding)

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|---|---|---|--|
| <ul style="list-style-type: none">● Imagine Nebraska Act:
Tax incentives for expansion projects (\$25—150 million) | <ul style="list-style-type: none">● Community Development Block Grant:
Partially forgivable loans for expansions that create quality jobs. (\$ varies) | <ul style="list-style-type: none">● Urban Redevelopment Act:
Tax credit for expansion in urban areas (\$8 million through 2031) | <ul style="list-style-type: none">● Local Option Economic Development Act:
Cities may collect and appropriate local tax dollars for economic development projects (\$ varies) |
| <ul style="list-style-type: none">● Nebraska Transportation Innovation Act:
Discretionary grants for transportation improvements for economic development projects (\$ varies) | <ul style="list-style-type: none">● Tax Increment Financing:
Repayment of property tax on expansions in blighted and substandard areas (\$71 million) | <ul style="list-style-type: none">● Site & Building Development Fund:
State grants for new construction (\$3 million) | <ul style="list-style-type: none">● Nebraska Rural Development Act:
Tax credit for expansion in rural areas (\$1 million) |
| <ul style="list-style-type: none">● Manufacturing Equipment Exemption:
Sales tax exemption on manufacturing equipment (\$78 million) | <ul style="list-style-type: none">● Nebraska Advantage R & D Act:
Tax credits for R & D investment (\$6 million) | <ul style="list-style-type: none">● Local Economic Development Grants and Entitlements:
Grants or other benefits from local county or city (\$ varies) | <ul style="list-style-type: none">● Nebraska Advantage Microenterprise Tax Credit Act:
Tax credit for investment in small companies (\$2 million) |
| <ul style="list-style-type: none">● Nebraska Job Training and Recruitment:
Job training and recruitment grants for expansion projects (\$ varies) | <ul style="list-style-type: none">● New Markets Tax Credit:
Tax credit grant for investments in projects in low income areas (\$15 million) | <ul style="list-style-type: none">● Nebraska Capital Gains Exclusion:
Nebraska income tax exclusion for sale of company (\$21 million) | <ul style="list-style-type: none">● For more information, ask for our Nebraska Business Expansion Decision Guide. |

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Qualifying For Tax Increment Financing

Problem: Multiple factors must be met to qualify for Tax Increment Financing for developing a business expansion project. Under Tax Increment Financing, the property tax increases resulting from a development can be earmarked to repay certain eligible costs required by a project.

What To Do: If a project is properly planned and located in a “blighted” or “substandard” area, the company may apply up front to use Tax Increment Financing to help pay for a part of the business expansion project. Local government approval is needed in advance.

Optimizing Nebraska Tax Incentives

Problem: Most state tax incentive programs have certain requirements to qualify for and optimize the available incentives. These can relate to the level of new investment and jobs, the type of business, the level of compensation, the locations, the corporate structure and the type of property being acquired. We typically review over 25 factors in preparing Nebraska incentive projects (as well as ongoing project implementation).

What To Do: Under the Imagine Nebraska Act, the Project Application needs to be filed ahead of project commencement to optimize results. Ideally, potential issues are dealt with head on with the State before the project commitments are in place. Under these Acts, a Project Agreement is entered into with the State of Nebraska. This is a contract. The Project Application is part of this contract. So, both the Application and the Agreement need to be addressed with the same level of legal review and care as with all contracts (which some companies and their tax advisors don’t realize until too late). Options for Appeal exist for issues that are not resolved, either during the Project Application process or during Project Implementation. (See [Side Panel](#) on subsequent page for more discussion).

Wayfair Changes The Rules On Sales Tax Collection

Problem: In the recent *Wayfair* decision, the U.S. Supreme Court eliminated the traditional physical presence rule, which held that a company must have physical presence in a state in order to be required to collect sales tax in that state. This means that sellers may need to collect sales tax in a state even if they are not physically located in that state.

What To Do: *Wayfair* is a game changer. This reversal of the physical presence rule will mean that all companies selling products or services in multiple states will need to determine whether they now have a sales tax collection requirement. Failure to determine this accurately can result in under collection (with tax due upon Audit) or over collection (which in effect becomes a noncompetitive overcharge). Companies must also align their Purchasing practices to be sure they are not inadvertently paying a use tax on purchases where the seller has stepped up its tax collections. Nebraska has issued guidance that out-of-state sellers must begin to collect tax in January 2019.

A Business Buyer’s Liability For the Seller’s Unpaid Taxes

Problem: Nebraska tax law can, in certain cases, require the purchaser of a business to pay the unpaid taxes of the predecessor owner.

What To Do: This can be largely addressed in the drafting of the Purchase Agreement, along with the due diligence process. In addition, if a company properly plans and requests clearance from the Department of Revenue, this will help avoid taxes of a predecessor.

Bundled Transaction Rules

Problem: An improperly structured purchase transaction, in a which a purchaser receives multiple goods or services for one, non-itemized price, can cause tax to be imposed on the purchase of otherwise nontaxable goods or services.

What To Do: If a company plans its purchase or sale transactions to avoid classification as a bundled transaction, it may avoid unnecessary sales or use tax. We are addressing whether this is actually one nontaxable transaction or can be broken into taxable and nontaxable portions.

Classification as Taxable Goods or Nontaxable Services

Problem: It is not always clear whether a purchase transaction is for taxable goods or nontaxable services. The answer to this drives whether the overall transaction is subject to sales and use tax.

What To Do: If a company structures its transactions in light of the Department’s six factor test for distinguishing nontaxable services from taxable goods, it may reduce its ultimate sales tax cost on the transaction to zero. When this reaches Audit or Appeal, we usually need to bring both the Department’s test as well as applicable “principal object” Case Law into play.

Qualification for Alternative Apportionment

Problem: Nebraska amended its statutes to add new apportionment rules that, in general, better reflect the relative economic activity of many companies in Nebraska. However, for some companies, the statutory apportionment rules do not fairly represent a company’s Nebraska activities.

What To Do: If a company receives an alternative apportionment ruling, it may apportion its income to Nebraska using a test appropriate for its business model. This now needs to be applied for before the tax year. This is subject to Appeal if not granted.

Real Property Valuation

Problem: Business property is often valued too high for property tax purposes (both for locally assessed and centrally assessed taxpayers). There are two general arguments against a county assessor’s valuation. First, that the property is simply overvalued. Second, that the property is overvalued in comparison with other, similar properties.

What To Do: We find that many potential property value disputes can be handled in advance informally, by working directly with the County Assessor’s office before the property assessment. Otherwise, we need to address this on Appeal to the County Board of Equalization or the Tax Equalization and Review Commission.

Manufacturing Sales Tax Exemption

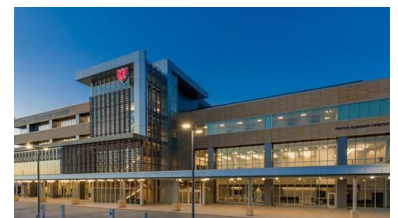
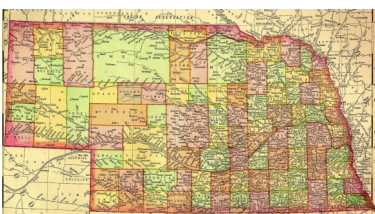
Problem: Purchase of manufacturing equipment is exempt from sales/use tax if purchased direct by a manufacturer.

What To Do: Determine the buyer qualifies as a manufacturer. If a contractor is involved make sure its an Option 1 contractor or that purchase or construction agreement has direct purchase provisions.

Corporate Income Tax

Problem: The Nebraska apportionment rules, the interplay of Federal Income Tax provisions with Nebraska taxable income, and allowable credits is not always clear.

What To Do: A careful review of your Federal tax return with impacted Nebraska provisions. Specifically address whether your apportionment method meets Nebraska’s tests and whether all available Nebraska credits are qualified and properly claimed.



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During The Audit: Team Approach

Companies are seeing the value in a Tax Defense Team. So they are having us work with their in-house Tax Team and/or outside CPAs to have us review and vet potential tax issues and problem areas before the auditor is let into the door. This is so the best strategy can be determined up front. There is too much at stake. We want to help assure the fact issues and legal issues and positions are known and properly expressed from the get go.

We have developed a State Tax Defense Playbook to help achieve the best results.

Some of the best practices during the Audit phase are discussed next.

Behind The Scenes Involvement

Problem: Potential Audit issues can go off the track early on (often irretrievably) if facts are not correctly explained or the correct legal issue isn't spotted or dealt with properly.

What To Do: We are often engaged to work behind the scenes (during the Audit Phase) to add legal insights, perspective, and strategy to the Tax Defense Team (or to "ghost write" the proposed response to key issues). We are also able to help move the Audit (or Audit Supervisor) beyond spending time and resources in areas that are not being viewed correctly.

"Tenth Man Rule"

Problem: Both the taxpayer and Tax Defense Team can become unreasonably optimistic or pessimistic about an issue or case.

What To Do: We deploy the "Tenth Man Rule" (Before, During and After the Audit). The "Tenth Man Rule" (also known as the "Devil's Advocate") always has someone play the part of the contrarian - no matter how solid or weak your issue or case may seem. This helps uncover blind spots and helps assure both the strengths and weaknesses of the issue or case are properly vetted and considered.

Cost/Benefit

Problem: Each tax matter (usually) has a known benefit (during and after the audit cycle).

What To Do: Always estimate the cost (in-house and outside) to get to a win or favorable settlement - at each stage of the Audit and Appeal(s).

Sampling: Agree or Not?

Problem: The Department of Revenue typically requests that taxpayers enter into a Sampling Agreement, giving it authority to employ a sampling method.

What To Do: We often suggest proceeding with sampling without a signed Sampling Agreement (which can have the effect of keeping your options open).

Objecting To Document Requests

Problem: The Department of Revenue has broad authority to subpoena a company's records for the purpose of determining tax compliance.

What To Do: There are times to object to document requests that are not relevant to a tax issue, that request privileged communications, or that do not line up with an agreed upon sampling method. A letter from legal counsel can be used to back this up.

Preserving Privileged Communication

Problem: Privileged documents can lose protection if they have been provided by the taxpayer to an external third party or CPA.

What To Do: Taxpayers should ensure that they are not losing the privilege protection and are not providing privileged communications to the Department of Revenue.

After The Audit: The Appeal

The first step in the legal proceeding that is considered the Appeal of an Audit occurs when the "Petition for Redetermination" (often just called the "Protest") is filed in response to the "60 day" letter issued by the Department of Revenue after a Sales/Use or Income Tax Audit that has not been yet resolved.

Depending on the tax matter, this can occur in other situations as well. This may be the Appeal of a property tax assessment or the Appeal of a Department of Revenue disagreement relating to an incentive matter.

In either case, this Petition (or Protest) is the initial official legal "pleading" in the case. It needs to carefully lay out the factual and legal grounds for the Appeal. It will impact the entire rest of the case, from the potential for settlement to the prospects for prevailing, should the case need to go on to Court.

The filing of the Petition (or Protest) should not, however, be considered to be destined to end up in the Nebraska Courts.

Instead, in the usual Sales/Use or Income Tax Appeal, the case is assigned to a Department Attorney for us to work with. Both parties need to further develop the facts and the legal grounds and work towards possible Settlement.

If the case cannot be resolved in this "informal" process, then either party may request that the case be set up for a Formal Hearing with a Hearing Officer appointed by the Tax Commissioner.

The purpose of this Hearing is two-fold. First is to create the official "record" of the facts (in the form of documents and testimony). The second is for the Hearing Officer, after the case has been briefed, to reach a recommended decision for the Tax Commissioner.

If this does not result in the Taxpayer's favor, we can appeal the case to the Nebraska District Court.

The District Court will schedule a Hearing, which will be based on the "record" of facts established at the Department Hearing. The District Court will render a judgment (after being briefed) based on the Court's own view of the proper result. From there, either party may appeal.

Some further considerations are below.

Procedural Requirements

Problem: In any Nebraska tax dispute (whether on Appeal within the Department of Revenue or on to Court), certain procedural steps need to be taken in order to preserve the right to protest a tax assessment, file a refund claim, build the necessary factual record, and express and preserve all potential legal defenses.

What To Do: If a taxpayer wishes to protest an assessment, it must understand the procedural requirements associated with the desired filing, including the items that must be pled to constitute a valid Appeal.

Refund Claims

Problem: In Nebraska, the filing of a Refund Claim does not automatically entitle the taxpayer to an administrative hearing.

What To Do: If a taxpayer wishes to file a Refund Claim, we must lay out the proper facts and legal grounds in the Claim and determine whether to request a backup Hearing.



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Settlement Strategies

Problem: Successful settlements are not a matter of chance. You can't expect the Department to agree to a fair resolution, unless we have first presented a strong defense that the Department will recognize (as a matter of sound legal basis and litigation risk). So, while most of our cases settle, a number of steps must first be taken to lay in and position the proper groundwork for a successful settlement posture.

What To Do: To reach a favorable settlement, we must first demonstrate the strength of the taxpayer's factual and legal position and then move ahead with the speed, clarity and attitude consistent with a belief in that position.

Beyond the Statutes

Problem: A winning tax defense position at all 3 stages (Before, During and After the Audit) needs to recognize (and potentially defend against) a variety of overriding tax law principles which extend beyond the wording of the statute, regulation or ruling.

What To Do: Legal "common law" doctrines, such as Substance Over Form, Step Transaction, Economic Substance, Sham Transaction and Business Purpose, need to be understood (and planned for) at the time of the transaction and deployed or defended against in the Audit or Appeal.

Rules Of The Game

Problem: Just as in any ongoing competition, the rules of the game must be known, understood and deployed, when appropriate, to your advantage. These may include, for example, Rules of Evidence, Protection of Privileges, Burden of Persuasion, Rules of Construction, Taxpayer Rights, Due Process, Assessment Standards, Equitable Recoupment, Nexus and Burden of Proof.

What To Do: Determine up front which of these game rules will come into play in your case. These can make the difference between a win, a loss or a great settlement.

The Science Behind It

Problem: Ultimately a tax matter is resolved by convincing the person reading your analysis of the soundness of your view. You can't do this unless the reader understands your view (and in the case of tax matters, this means multiple readers, potentially from the auditor, to the supervisor, to the legal staff, to the settlement committee, to the Tax Commissioner, to the Hearing Officer and to the Court).

What To Do: Like it or not, people learn and understand in 4 different ways: Visual, Auditory, Reflective and Kinesthetic (known as VARK). A winning tax defense approach needs to deploy the best ways to reach and convince all 4 learning styles.

Unauthorized Practice of Law

Problem: The unauthorized practice of law by non-lawyers is an issue being taken seriously by State Bar Associations nationwide, as well as applicable judicial officials. In Nebraska, non-lawyers cannot take any action in a Nebraska tax defense that requires "the knowledge, judgment, or skill of a lawyer." NDR Reg. 33-008 and Neb. Sup. Court Rule 3-1003. This is the situation in many Tax Audits as well as Appeals (i.e. protests) of tax assessments. This really hit home recently when we were asked by a multistate company (headquartered outside Nebraska) to review a lengthy letter (essentially a Legal Brief) that had been sent to the Department of Revenue with little positive effect. This "Brief" had been prepared by an outside non-lawyer and was very official looking, being filled with over 30+ legal citations and a lot of legal discussion. The problem was that the non-lawyer had missed the critical issue and hadn't marshalled the critical facts needed to make the case. Just as in other professions, these rules are in place to protect persons from those who try to deploy professional expertise and insights they don't have (or may not be aware of). We urge caution by non-lawyers and companies alike.

What To Do: If your company, or a client, receives an Audit notice or tax assessment, a State Tax Attorney should be engaged upon receipt so that critical potential issues and a thoughtful game plan can be determined up front.



Nebraska Incentives Critical Legal Criteria

As in business operations and in overall site development, Business Expansion Incentive results are best achieved when the Critical Legal Criteria for your Project are identified and addressed up front.

We should check into these criteria

Application Issues and Project Design

- Which Program:** Several Nebraska business expansion (tax and nontax) incentives are available. Before beginning an expansion, these should be reviewed to determine which may fit and be of overall value.
- Project Entities:** The Company unitary group needs to meet the eligible entity statutory requirements.
- Qualified Business:** The project must be proven to be for one or more "qualified business" activities.
- Project Activities Description:** This needs to be carefully addressed to achieve eligibility and to address intended exclusions.
- Commitment:** The Company needs to carefully decide or understand on the level of new employment and investment impacting the tier or level of benefits. This will impact the Company's maximum incentives and future options.
- Employees:** Base year employee count and statutory compensation levels need to be understood up front.
- Coordinate With State & Local "Entitlements":** Project parameters and timing need to be coordinated with state and local government approvals, site specific "entitlements" and other incentives.

Multiple Locations

- Locations:** The scope of the project needs to be determined up front to optimize results.
- Multiple Sites:** For multiple locations to qualify as one project, specific interdependence factors or certain geographic options must be determined up front.

Contract With State

- Legal Contract:** The State or local government will issue an incentive Agreement to the Company. This Agreement normally legally incorporates into the contract all of the wording in the Application (including in any preprinted form) and the Application addenda. So, the Application should be drafted and reviewed by legal counsel for legal considerations like all other contracts.

Claiming Benefits

- Filing Claims:** Claims filed for incentives should include specific statutory legal grounds and include a backup Hearing request to preserve legal options that may be needed.

Qualified Property

- Eligible Property:** Property must meet certain project use tests and be located at a project location.
- Relevant Dates:** New property is normally eligible only if acquired after the Application date and before the end of the entitlement or performance period.
- Software As Eligible Asset:** To constitute qualified property for Nebraska tax incentive purposes, the Company must have specific terms in its agreement with the software provider and must have received a nonexclusive license for use of the software.

Real Property Construction

- Contract Terms:** Certain contract requirements need to be met regarding the purchasing agent appointment, the general contractor certification, and specific language in the construction contract relating to tax obligations. This includes build-to-suit leases.

Incentive Optimizing

- Compliance:** Specific, detailed documentation will need to be kept to obtain the available tax and nontax incentives.
- Equipment:** Purchase and lease contracts should contain tax situs and payment provisions.

Statutory Limits

- Prohibited Actions:** Nebraska law restricts incentive benefits for certain transactions and activities (such as between affiliated companies), which need to be understood in advance.

Resolving Issues

- Project Issues:** Special legal procedures and time limits apply for reporting and for challenging the Department of Revenue or the Department of Economic Development or local government.

Business Sale

- Project Transfer:** Specific requirements normally apply to transfer the project to a buyer while protecting seller.

Based on 30+ years of our Project involvement, the speed of the incentive approval and payment/refund process is much quicker when we work with the Project Team in advance to address these Critical Legal Criteria.

Nick Niemann Profile



When a business succeeds, so do its employees, their families and the community. This fact has motivated Nick to work with McGrath North, community leaders, entrepreneurs and other professionals to build jobs and develop industry-leading companies.

This passion for helping businesses succeed led him to designing Nebraska's leading economic development programs and also participating in an international movement for innovating and creating new business models which impact business success and community growth.

State Tax, Incentive and Site Development Practice

As a Nebraska-based State & Local Tax & Incentives Attorney, Nick has been working for over 37 years with company executive, tax, legal and site development personnel from around the country.

He is called on by them to address Nebraska state and local tax and incentive planning strategies, site selection and development and Nebraska tax disputes (audits, claims, appeals and settlement).

Nick has been engaged by companies in many business sectors, including:

- Headquarters
- Consumer Product Manufacturing
- Industrial Manufacturing
- Business Services
- Food and Beverage
- Construction
- Consumer Services
- Data Centers
- Leasing
- Financial Services
- Retail
- Human Resources
- Franchise
- Security
- Professional
- Distribution Centers
- Technology Licensing
- Renewable Energy
- Transportation
- Data Processing
- Warehousing
- Telecommunications
- IT Development
- Health Care
- Agribusiness
- R & D
- Education
- Personal Services
- Insurance
- Banking
- Processing

He has led McGrath North teams responsible for all aspects of site development and economic incentives in Nebraska, including site selection, site acquisition, site negotiation, regulatory and building approvals, project incentives and project entitlements.

State Tax, Incentive and Development Legislation

Nick has designed and drafted much of Nebraska's tax, tax incentive and site development legislation. He was the principal designer and drafter of the following Nebraska programs:

He was also a co-designer and co-drafter of various other tax and incentive legislation, such as the Imagine Nebraska Act, LB 1107 (2020), LB 895 (2008) which added Tier 6 to the Nebraska Advantage Act, LB 872 (2012) which adopted the market state apportionment rule for business services income, LB 343 (2007) which extended the capital gain exclusion to extraordinary dividends and LB 161 (2017) which extended the tax incentive benefit carry forward period for Tier 6 projects. He has also worked with Nebraska's business community and lobbyists to defend legislative attempts to repeal or reduce these programs.

- LB 312 – Nebraska Advantage Act (2005)
- LB 775 – Employment and Investment Growth Act (1987)
- LB 829 – Quality Jobs Act (1995)
- LB 775 – Nebraska Employee Capital Gain Exclusion (1987)
- LB 830 – Nebraska Redevelopment Act (1995)
- LB 620 – Invest Nebraska Act (2001)
- LB 312 – Nebraska Manufacturing Sales Tax Exemption (2005)
- LB 772 – Single Factor Sales Corporate Income Tax Formula (1987)
- LB 427 – Nebraska Job Training Fund (2005)
- LB 559 – Corporate Income Tax Throwback Repeal (1995)
- LB 1063 – Accelerated Depreciation Equipment Property Tax (1992)
- LB 219 CA – Constitutional Amendment to fix the property tax equalization and exemption provisions (1992)

The above incentive and development programs have created over 100,000 new jobs and \$35 billion of capital investment in over 900 business expansions throughout Nebraska.

Economic Development Studies

Nebraska's Governors and State Directors of Economic Development have consulted with Nick on economic development policy for over 3 decades. He has also authored a number of studies for the business community outlining strategies to improve Nebraska's business climate.

Peer Review Background

- "Lawyer of the Year" – Best Lawyers in America (2019 and 2020 – Omaha) - Tax Law
- "Lawyer of the Year" – Best Lawyers in America (2015 - Omaha) - Tax Litigation and Controversy
- "Best Lawyers in America" - Tax Law; Tax Litigation & Controversy; Closely Held Companies and Family Businesses Law
- Martindale Peer Review Rating – AV Preeminent (5.0 out of 5)
- Lifetime Fellow, Nebraska State Bar Foundation

State Tax Professional Speaker

- Great Plains Tax Institute – Speaker, State Taxation and Economic Development (2002-2022)
- Council On State Taxation – Speaker, State Taxation National Program
- Tax Executives Institute – Speaker, State Taxation
- Nebraska Society of CPAs – Speaker, State Taxation and Economic Development
- Adjunct Professor, State Tax, Creighton University School of Law

Professional Background

- Attorney (Nebraska Bar 1981)
- Certified Public Accountant (CPA-Inactive Registrant)

Professional Organizations

- Council on State Taxation (COST)
- Nebraska & American Bar Associations
- Nebraska Society & American Institute of CPAs
- Vistage International Trusted Advisor Board
- Omaha Chamber of Commerce Headquarters Target Advisory Board
- Nebraska Chamber of Commerce Tax Council
- Nebraska Chamber of Commerce Economic Development Council

Author

- Bloomberg BNA Corporate Income Tax Navigator (Nebraska Section)
- ABA Multijurisdictional Admission to Practice Requirements for State and Local Tax Lawyers (Nebraska Section)

Education

- Creighton University School of Law, J.D., *Magna Cum Laude*, 1981
- Creighton University College of Business, B.S.B.A., *Summa Cum Laude*, 1978

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Matt Ottemann Profile



For clients facing current or anticipated tax audits, and in need of expert counsel for tax planning and assessment defense, Matt's experience and strategic solutions provide welcome relief.

He also helps clients head off potential problems at the pass, understanding and planning for the tax ramifications of significant business events.

Matt's analytical approach keeps his clients informed on how the law will, or could, affect their business decisions. Looking at situations with a business model analysis helps Matt spot potential pitfalls the client might have overlooked, and it helps keep the big picture intact – from transaction to transaction.

If a dispute should arise, Matt works with a client's tax professionals to provide superior representation and achieve the best possible results.

State and Local Tax and Incentive Practice

Matt specializes in taxation, including state and local taxation, state tax disputes and appeals, state business tax incentives, and site selection and planning.

He has represented clients of all sizes in both income, withholding, and sales tax assessments and claims before the Nebraska Department of Revenue.

In addition, Matt has an extensive background in state tax incentives, including the Nebraska Advantage Act and Iowa's and Missouri's incentive programs, and has advised clients of all sizes with their tax incentive applications and claims.

Professional Speaking

Matt has served as a speaker on a variety of state tax and incentive topics for the Nebraska Society of CPAs, the Nebraska Bar Association, and Lorman and NBI Seminars.

He has been selected as an adjunct faculty member to teach business students at Creighton University College of Business for several years. Matt has also served as an adjunct faculty member to law students at the Creighton University School of Law.

Member and Affiliations

Matt is admitted to practice before the United States District Court, District of Nebraska; the United States Tax Court; the United States Court of Federal Claims; the United States Court of Appeals, Eighth Circuit; and Nebraska's state courts.

Author

- LexisNexis Federal Tax Advisor
- LexisNexis Nebraska Practice Insights

State Tax Speaker

- Nebraska Society of CPAs
- Nebraska Bar Association
- Lorman and National Business Institute

Professional Background

- Attorney (Nebraska Bar 2006)
- Certified Public Accountant (CPA-Inactive Registrant)

Professional Organizations

- Omaha Bar Association
- Nebraska State Bar Associations
- American Bar Association, State and Local Taxes Committee
- Nebraska Society of CPAs
- Financial Planning Association

Education

- University of Alabama School of Law L.L.M. in Taxation, Magna Cum Laude & Valedictorian, 2010
- Creighton University School of Law, J.D., Summa Cum Laude, 2006
- Creighton University College of Business, B.S.B.A, Summa Cum Laude, 1999

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McGrath North focuses first and always on Client Success. We have a talented team of over 70 attorneys and professionals who effectively and successfully collaborate with our clients, including small and mid-size businesses to Fortune 500 companies operating in a broad range of industries.

We judge ourselves based on the real-world value we provide to our clients, whether they are operating in the Midwest, across the country, or in business centers across the globe. We are fueled to achieve that success by a relentless concentration on Excellence.

To be our best, McGrath North is always transforming and investing in talent, technology, and leadership, with a genuine commitment for building diversity, equity and inclusion within our firm, our profession and our community. While we are proud of our first 60 years of service, we are always innovating and recreating ourselves for the challenges ahead for our clients.

Welcome to McGrath North!

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ATTORNEYS

Inspired By Excellence. Committed To Your Success.

For over 60 years we have been working with our nation's food companies, restaurants, farmers and ranchers to feed people better. We have been working with contractors and companies to build better and more affordable homes and new business facilities.

We have been working with technology companies to develop new ideas that improve lives. We have been working with inventors, startup companies and health care providers to develop patented medical devices, leadership teams and joint ventures that save lives. We have been working with energy companies to help fuel our homes and the businesses we all rely on.

We have been working with bankers, key partners, manufacturers, distributors, retailers and transportation companies to finance, produce and deliver better products and services to communities around the world. We have been working with family business pioneers and their other trusted advisors to transform, grow, carry on and transition the family business dream, the backbone of our great country.

We have been working with our community leaders to improve our cities and our schools. We have been working with our elected leaders to improve the business climate to create and attract new and better jobs for families.

For over 60 years, this has been the McGrath North Law Firm.

Working quietly behind the scenes closely with the talented leaders of great organizations around the world to make lives better.

Working together. Working stronger. Working faster. Working better. Overcoming Roadblocks. Avoiding Train Wrecks.

Inspired by Excellence. Committed to your Success.

Our diverse team isn't waiting for the future. We are helping to produce new, incredible, sustainable results right now.

We invite you to join us as we move quickly ahead towards the next 60 years.



Results Realized

Collaborating with Companies and CPA Firms on:

- State Tax Audits
- State Tax Appeals
- State Tax Planning
- State Tax Incentives
- State Business Incentives
- Site Development Incentives
- Property Tax Appeals

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