

## Opinion No. 70-101

December 23, 1970

**BY:** OPINION OF JAMES A. MALONEY, Attorney General

**TO:** The Honorable Michael Alarid State Senator 1608 Escalante S.W. Albuquerque, N.M. 87104

### QUESTIONS

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Can the legislature provide an income tax credit for all resident individuals for property taxes paid in New Mexico? This credit would embrace payments to those whose credit exceeds income tax due or who owe no income tax.

#### CONCLUSION

No.

### OPINION

#### {\*182} ANALYSIS

In recent years, many states have attempted to aid low-income and senior citizens by providing property tax relief through the use of an income tax credit.

The proposal under consideration, as we understand it, would return to the property-owning taxpayer part or all of the money he has paid in property taxes. In effect, the State would take money from the taxpayer with the right hand -- the property tax -- and would return the money with the left hand -- the income tax credit. While there is a serious question whether this law effectively grants an ad valorem tax exemption not authorized by the constitution, we need not consider that {\*183} question here. The law clearly suffers another, fatal defect. It violates the equal protection clauses of the State and Federal Constitutions by conferring the benefit only upon those who own property.

The proposal is intended to ease the tax burden on those who pay property taxes. Recent decisions of the United States Supreme Court indicate that ownership of property is not a reasonable classification to accomplish this purpose. The tenant pays real property taxes as well as the landowner because the landlord can treat the tax as a business expense and pass it on to the tenant in the form of higher rent. The United States Supreme Court has recognized this economic fact in **Phoenix v. Kolodziejki**, U.S. , 90 S. Ct. 1990, 26 L. Ed. 2d 523 (1970).

In **Board of Educ. of the Village of Cimarron v. Maloney**, N.M. Sup. Ct. No. 9160, issued December 7, 1970, the New Mexico Supreme Court, following **City of Phoenix v. Kolodziejski**, *supra*, held that the New Mexico constitutional provision requiring those voting on school bond issues to be owners of real estate within the school district is unconstitutional under the United States Constitution. The New Mexico Supreme Court disagreed with the reasoning of the United States Supreme Court, but nevertheless found it to be controlling. It is our opinion that the same reason is controlling in the present case.

While the legislature unquestionably has "a wide range of discrimination in distinguishing, selecting and classifying subjects of taxation", that power is qualified by the requirement that the classification be reasonable. **Amarillo-Pecos Valley Truck Lines v. Gallegos**, 44 N.M. 120, 99 P.2d 447 (1940). In **Walters v. City of St. Louis**, 347 U.S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954), the United States Supreme Court elaborated on what "reasonable" entails. Reasonableness requires "that the distinction have some relevance to the purposes for which the classification is made and that the different treatments be not so disparate relative to the difference in classification as to be wholly arbitrary." *Id.* p. 237. Since both property owners and tenants pay property tax, a classification based on ownership has no relevance to the purpose of easing the burden of property taxes and is, consequently, arbitrary and discriminatory.

It was mentioned above that many states have enacted legislation similar to that proposed by the bill submitted to this office. There is one distinction, however, and that is in those states which have provided property tax relief through the use of an income tax credit, the relief has not been limited to those who own property, but rather has been extended to allow those renting property a similar credit. The State of Michigan, for example, allows 17% of the gross rent paid as a State income tax credit. The landlord is not entitled to a credit on leased or rented property unless the tenant does not claim the credit. See Section 206.258, M.C.L.A. (Mich. Pub. Act 332, Laws 1969).

We conclude that the proposed legislation violates both the New Mexico and United States Constitutions.

By: Gary O'Dowd

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