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DWIGHT TRUMBLE, APPELLANT AND CROSS-APPELLEE, V. SARPY COUNTY BOARD ET AL., APPELLEES, AND DOUGLAS COUNTY SCHOOL DISTRICT 0001, ALSO KNOWN AS OMAHA PUBLIC SCHOOLS, APPELLEE AND CROSS-APPELLANT.

810 N.W.2d 732

Filed March 16, 2012. No. S-10-1235.

1. **Motions to Dismiss: Jurisdiction: Appeal and Error.** Aside from factual findings, the granting of a motion to dismiss for a lack of subject matter jurisdiction is subject to a de novo review.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court.
3. **Constitutional Law: Declaratory Judgments: Taxes.** The proper means of challenging the constitutionality of a tax statute is a declaratory judgment action under Neb. Rev. Stat. § 25-21,149 (Reissue 2008).
4. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
5. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes: Legislature.** When the Legislature provides a specific definition for purposes of a section of an act, that definition is controlling.
7. **Statutes.** To the extent there is a conflict between two statutes on the same subject, a specific statute prevails over a general statute.
8. **Taxes: Statutes: Words and Phrases.** A tax can meet the specific definition of "illegal" in Neb. Rev. Stat. § 77-1735 (Reissue 2009) if it is either collected for a purpose that is "unauthorized" or levied because of conduct that was "fraudulent."
9. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
10. ____: ____: ____. When considering a series or collection of statutes pertaining to a certain subject matter, which statutes are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
11. **Statutes: Legislature: Presumptions.** In enacting an amendatory statute, the Legislature is presumed to have known the preexisting law.
12. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When an appellate court judicially construes a statute and that construction fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Matthew V. Rusch and Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellant.

Kenneth W. Hartman, Elizabeth Eynon-Kokrda, and Kelly R. Dahl, of Baird Holm, L.L.P., for appellee Douglas County School District 0001.

Patrick J. Sullivan and Benjamin E. Maxell, of Adams & Sullivan, P.C., for appellee School District No. 1 of Sarpy County.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ., and SIEVERS, Judge.

WRIGHT, J.

NATURE OF CASE

At all times relevant to this case, Dwight Trumble owned property in Sarpy County, Nebraska. On December 31, 2009, he paid two levies for the support of school districts in the Learning Community of Douglas and Sarpy Counties (Learning Community): a general fund levy and a special building fund levy.

On April 26, 2010, Trumble brought suit under Neb. Rev. Stat. § 77-1735 (Reissue 2009) against the school districts in the Learning Community, claiming the levies, which were authorized by Neb. Rev. Stat. § 77-3442(2)(b) and (g) (Reissue 2009), were unconstitutional. Douglas County School District 0001, also known as Omaha Public Schools (OPS), and School District No. 1 of Sarpy County (Bellevue) moved to dismiss, and Trumble moved for summary judgment. The district court determined it did not have jurisdiction and dismissed the case. Because Trumble alleged the unconstitutionality of a statute, he appealed directly to this court. For the reasons set forth herein, we affirm.

SCOPE OF REVIEW

[1,2] Aside from factual findings, the granting of a motion to dismiss for a lack of subject matter jurisdiction is subject

to a de novo review. *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011). To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court. *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

FACTS

The levies at issue in this case were also challenged in *Sarpy Cty. Farm Bureau v. Learning Community, ante* p. 212, 808 N.W.2d 598 (2012). They empower the Learning Community to levy up to $0.95 per $100 of taxable valuation for the general fund budgets of Learning Community school districts and $0.02 per $100 of taxable valuation for special building funds for Learning Community school districts.

In August 2009, the Learning Community adopted a $0.95 general fund levy and a $0.01 special building fund levy, and in October, the Sarpy County Board of Equalization included these levies in the county's 2009 tax levies. Trumble paid the Sarpy County levies on December 31, 2009. On January 11, 2010, Trumble made a written demand to the Sarpy County treasurer for the return of that portion of his property tax attributable to the Learning Community levies. He made this demand under § 77-1735, claiming the Learning Community levies were unconstitutional. Under § 77-1735(1),

> if a person makes a payment to any county or other political subdivision of any property tax . . . and claims the tax or any part thereof is illegal for any reason other than the valuation or equalization of the property, he or she may, at any time within thirty days after such payment, make a written claim for refund of the payment from the county treasurer to whom paid. . . . If the payment is not refunded within ninety days thereafter, the claimant may sue the county board for the amount so claimed. . . . For purposes of this section, illegal shall mean a tax levied for an unauthorized purpose or as a result of fraudulent conduct on the part of the taxing officials.

The Sarpy County treasurer did not respond to Trumble's request for repayment, and Trumble filed suit on April 26,

2010. He alleged that § 77-3442(2)(b) and (g) and Neb. Rev. Stat. §§ 79-1073 and 79-1073.01 (Supp. 2009), which authorized the collection and dictated the distribution of general fund and special building fund levies for a learning community, were unconstitutional. Trumble sought a judgment that these statutes were unconstitutional and that the taxes he paid under the statutes had to be returned pursuant to § 77-1735 and Neb. Rev. Stat. § 77-1736.06 (Reissue 2009).

On September 24, 2010, OPS and Bellevue each moved to dismiss for lack of subject matter jurisdiction, failure to state a claim on which relief could be granted, and failure to join a necessary party. Trumble moved for summary judgment on September 27. On October 18, the district court overruled a motion filed by OPS to continue Trumble's summary judgment motion and took OPS' and Bellevue's motions to dismiss under advisement. The next day, the district court heard Trumble's summary judgment motion.

[3] The district court issued its order on December 14, 2010. It determined that "unconstitutional" taxes were not "illegal" taxes that could be recovered under § 77-1735 and that the proper means of challenging the constitutionality of a tax statute was a declaratory judgment action under Neb. Rev. Stat. § 25-21,149 (Reissue 2008). That section states in part: "Any action or proceeding seeking a declaratory judgment that any tax, penalty, or part thereof is unconstitutional shall be brought in the tax year in which the tax or penalty was levied or assessed." *Id.* The district court held that it lacked jurisdiction because Trumble had not alleged the collection of an "unauthorized" or "illegal" tax under § 77-1735 and because Trumble filed the action outside the tax year when the taxes were levied.

The district court relied on *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993). The district court concluded that in *AMISUB*, this court determined that Neb. Rev. Stat. § 77-1736.04 (Cum. Supp. 1992), rather than § 77-1735, was the proper means of challenging the constitutionality of a tax already paid. The district court recognized that § 77-1736.04 has since been repealed, but determined that the interpretation in *AMISUB* of § 77-1735

was still good law following the repeal of § 77-1736.04. The district court granted the motions to dismiss, denied Trumble's request for summary judgment, and dismissed the complaint. Trumble appealed.

ASSIGNMENTS OF ERROR

Trumble alleges the district court erred in determining it lacked jurisdiction and dismissing the complaint. On cross-appeal, OPS alleges the district court lacked jurisdiction because Trumble's complaint raised nonjusticiable political questions. OPS also alleges the district court erred in denying OPS' motion to continue the hearing on Trumble's summary judgment motion.

ANALYSIS

Mootness

We first consider whether this case is moot because of our decision in *Sarpy Cty. Farm Bureau v. Learning Community, ante* p. 212, 808 N.W.2d 598 (2012). In *Sarpy Cty. Farm Bureau*, the taxpayers sought a declaratory judgment that the levy was unconstitutional. We upheld the constitutionality of § 77-3442(2)(b) against the same challenges that Trumble raises here. However, in *Sarpy Cty. Farm Bureau*, this court specifically refused to rule on the constitutionality of §§ 77-3442(2)(g) and 79-1073.01 because that issue was not raised before the trial court. Because Trumble questioned the constitutionality of §§ 77-3442(2)(g) and 79-1073.01 before the district court, this cause is squarely in front of this court and is not moot.

Jurisdiction

[4,5] Before any court can determine the constitutionality of a tax statute, the court must have subject matter jurisdiction. Trumble argues the district court should have ruled in his favor under § 77-1735. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *AMISUB, supra*. In assessing the meaning of a statute, we are guided by the principle that in the absence of anything to the contrary,

statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Moats v. Republican Party of Neb.*, 281 Neb. 411, 796 N.W.2d 584 (2011).

[6,7] Trumble contends that an "unconstitutional" tax is an "illegal" tax under § 77-1735. Section 77-1735(1) provides its own definition of "illegal" for purposes of this section. When the Legislature provides a specific definition for purposes of a section of an act, that definition is controlling. See *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993). This is a natural extension of the principle that "[t]o the extent there is a conflict between two statutes on the same subject, a specific statute prevails over a general statute." *Id.* at 663, 508 N.W.2d at 832.

[8] A tax can meet the specific definition of "illegal" in § 77-1735 if it is either collected for a purpose that is "unauthorized" or levied because of conduct that was "fraudulent." "[F]raudulent" means "given to or using fraud, as a person; cheating; dishonest . . . characterized by, involving, or proceeding from fraud, as actions, enterprise, methods, gains, etc." Webster's Encyclopedic Unabridged Dictionary of the English Language 564 (1989). An "unconstitutional" tax would not fit within this definition. "[U]nauthorized," however, means "not authorized," Webster's Third New International Dictionary of the English Language, Unabridged 2482 (1993), or "[d]one without authority," Black's Law Dictionary 1663 (9th ed. 2009). Trumble's argument in support of his claim that this lawsuit is allowed under § 77-1735 requires three steps: (1) The taxes permitted by § 77-3442(2)(b) and (g) are unconstitutional; (2) since they are unconstitutional, they are "unauthorized"; and (3) since they are "unauthorized," they fall within the § 77-1735 definition of "illegal."

[9] In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002). There is support in the text of § 77-1735 for excluding constitutional

challenges under that statute. The fact that "unauthorized" is used together with "fraudulent" in the definition of "illegal" indicates that "unauthorized" should be interpreted in light of the meaning of "fraudulent" to avoid reading the statute to say more than the Legislature intended. See *U.S. v. Stanko*, 491 F.3d 408 (8th Cir. 2007).

As late as 1993, this court determined that § 77-1735 could be used to challenge an unconstitutional tax. See *First Data Resources v. Howell*, 242 Neb. 248, 494 N.W.2d 542 (1993). After *First Data Resources*, the Legislature amended § 77-1735. See *AMISUB, supra*. The amendments eliminated language allowing for the recovery of "invalid" taxes and instead allowed for recovery of "illegal" taxes, with the term "illegal" defined as it is under the current statute. See, *id.*; § 77-1735. Following these textual changes, this court determined that § 77-1735 had a different meaning. *AMISUB, supra*.

In *AMISUB*, this court rejected the argument that an "unconstitutional" tax was an "unauthorized" tax and therefore an "illegal" tax that could be challenged under the amended version of § 77-1735. That determination was heavily influenced by § 77-1736.04, which once allowed for the recovery of illegal taxes. See *AMISUB, supra*. The same bill that changed "invalid" to "illegal" in § 77-1735 (1989 Neb. Laws, L.B. 762) also changed "illegal" to "unconstitutional" in § 77-1736.04. The Legislature later amended § 77-1736.04, but the statute continued to provide the procedure for challenging "unconstitutional" taxes. See *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993).

[10] When considering a series or collection of statutes pertaining to a certain subject matter, which statutes are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *Id.* To the extent there is a conflict between two statutes on the same subject, a specific statute prevails over a general statute. *Id.* Considering §§ 77-1735 and 77-1736.04 together, this court concluded in *AMISUB* that the Legislature meant to treat refunds for "unconstitutional" taxes differently than refunds for "unauthorized" taxes or taxes that were

fraudulently levied. Accordingly, § 77-1735 was determined to be an improper means for challenging "unconstitutional" taxes. *AMISUB, supra*.

Shortly after the *AMISUB* opinion was filed, the Legislature repealed § 77-1736.04 entirely. See 1992 Neb. Laws, L.B. 1, § 44. Trumble claims that with the repeal of § 77-1736.04, § 77-1735 once again allows a lawsuit to recover "unconstitutional" taxes. We are not persuaded by this argument.

In *AMISUB*, this court noted that the more important legislative changes brought about by L.B. 762 occurred in § 77-1736.04 rather than § 77-1735. We do not read §§ 77-1735 and 77-1736.04 as being so closely connected that the repeal of § 77-1736.04 also nullified this court's reading of § 77-1735 in *AMISUB*.

The *AMISUB* court interpreted two statutes that had been amended by the same bill. See L.B. 762, §§ 3 and 4. The Legislature has since made several changes to § 77-1735, none of which eliminated the term "illegal" from the statute or gave the term a different definition. See, 1991 Neb. Laws, L.B. 829, § 13; 1992 Neb. Laws, L.B. 1, § 16; 1995 Neb. Laws, L.B. 490, § 166; 2007 Neb. Laws, L.B. 334, § 81.

[11] In enacting an amendatory statute, the Legislature is presumed to have known the preexisting law. *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980). This court determined in *AMISUB, supra*, that § 77-1735 did not allow for the recovery of "unconstitutional" taxes. Then the Legislature repealed § 77-1736.04. Twice after that, the Legislature amended § 77-1735, and both times, it retained the term "illegal" and left the definition of "illegal" unchanged. See, L.B. 490, § 166; L.B. 334, § 81.

[12] Trumble would have us read §§ 77-1735 and 77-1736.04 to be so connected that when the Legislature repealed § 77-1736.04, it changed the meaning of § 77-1735 without changing the definition of "illegal" in § 77-1735. This court assumes the opposite. When we judicially construe a statute and that construction fails to evoke an amendment, we presume that the Legislature has acquiesced in our determination of its intent. See *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009). And we presume that when we have construed

a statute and the same statute is substantially reenacted, the Legislature gave to the language the significance we previously accorded to it. *Id.* In other words, we presume that the meaning of a statute does not change unless the Legislature changes its text. Because the Legislature retained the relevant text of § 77-1735 following *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993), the Legislature acquiesced in this court's interpretation of that text and the *AMISUB* court's interpretation of § 77-1735 remains good law.

We conclude that § 77-1735 is not applicable because it allows recovery for fraudulently levied taxes, but does not allow recovery for unconstitutional taxes.

We have considered the applicability of § 77-1735 in situations where the question of the constitutionality of a tax statute was not before us. In *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997), the plaintiff brought a declaratory judgment action instead of filing suit under § 77-1735. This court determined that § 77-1735 provided another "equally serviceable remedy," see 252 Neb. at 552, 567 N.W.2d at 99, which made a declaratory judgment action inappropriate. However, *Boettcher* does not control the case at bar. The plaintiff in *Boettcher* did not follow the procedures required by § 77-1735 or assign any constitutional errors for review, and this court did not discuss *AMISUB* or whether a suit could be brought under § 77-1735 to recover unconstitutional taxes.

Similarly, *Rawson v. Harlan County*, 247 Neb. 944, 530 N.W.2d 923 (1995), does not control the result here. In *Rawson*, the taxpayer requested a declaratory judgment to determine that the tax was illegal and unauthorized. In that context, we determined that § 77-1735 was a proper way to challenge a tax that had been paid and that, therefore, the district court lacked jurisdiction to hear a declaratory judgment action. This court did not reach the question whether the challenged tax was "illegal" or "unauthorized." We did not discuss *AMISUB* or determine whether a suit could be brought under § 77-1735 to recover "unconstitutional" taxes.

The case at bar presents what *Boettcher* and *Rawson* lacked: a plaintiff who sought relief under § 77-1735 and raised a

constitutional claim. This case presents us with the question whether a suit can be brought under § 77-1735 to recover "unconstitutional" taxes. We answer that question in the negative. The district court correctly determined it did not have jurisdiction under § 77-1735.

Section 77-1735 does not provide an adequate remedy for recovering an unconstitutional tax. A declaratory judgment is the proper method to challenge the constitutionality of a tax statute. See, *Boettcher, supra*; *Rawson, supra*. Such an action would have to be brought within the time constraints of § 25-21,149, which requires that declaratory judgment actions challenging the constitutionality of tax statutes have to be brought in the same tax year in which the taxes are levied or assessed. For completeness, we note that Trumble's argument that *Francis v. City of Columbus*, 267 Neb. 553, 676 N.W.2d 346 (2004), supports his position fails because *Francis* addressed Neb. Rev. Stat. § 16-637 (Reissue 2007) rather than § 77-1735.

In this case, the relevant tax year is calendar year 2009. Trumble's tax bills were received and paid in 2009. The receipts for Trumble's tax payments were dated 2009. Nebraska property taxes are due on December 31 of the calendar year in which they are levied, and they become a first lien on the property until paid or extinguished. See Neb. Rev. Stat. § 77-203 (Reissue 2009). The taxes at issue here were levied in tax year 2009, and Trumble's suit was filed in 2010. Because the suit was not brought in the same tax year in which the taxes were levied or assessed, the district court did not have jurisdiction under § 25-21,149. The district court lacked jurisdiction under §§ 25-21,149 and 77-1735, and it properly dismissed the complaint.

Cross-Appeal

Because the district court lacked jurisdiction, we need not consider OPS' cross-appeal.

CONCLUSION

Based on the text of § 77-1735; this court's opinion in *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993); and subsequent legislative

amendments, we conclude that a suit to recover unconstitutional taxes cannot be brought under § 77-1735. Trumble filed suit outside the tax year in which the challenged taxes were levied or assessed, so the district court did not have jurisdiction under § 25-21,149. Since the district court lacked jurisdiction, it properly dismissed the action. The judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., not participating in the decision.
MILLER-LERMAN, J., not participating.

BIG JOHN'S BILLIARDS, INC., APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLANTS AND CROSS-APPELLEES.

811 N.W.2d 205

Filed March 16, 2012. No. S-11-077.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.
6. **Jurisdiction: Final Orders: Appeal and Error.** The first step in determining the existence of appellate jurisdiction is to determine whether the lower court's order was final and appealable.
7. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
8. **Summary Judgment.** A summary judgment motion does not invoke a special proceeding. Instead, a summary judgment proceeding is a step in the overall action.