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ATTORNEY GENERAL OPINION NO. 79- 89

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Re: Taxation--Action to Protest Payment of Taxes--Pretrial Discovery of County Assessor's Field Notes and Work Papers

Synopsis: Because a county assessor is required to consider the factors enumerated in K.S.A. 79-503 in assessing property for taxation, documents, such as the assessor's field notes, which tend to show whether these factors were in fact considered in making an assessment, would be properly discoverable by a protesting taxpayer in an action under K.S.A. 79-2005.

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Dear Mr. Henry:

You have requested an opinion regarding the discoverability of a county assessor's field notes and memoranda by a plaintiff in an action under K.S.A. 79-2005 to recover property taxes paid under protest. Relying on Sebits v. Jones, 202 Kan. 435 (1969) and Mobil Pipeline Co. v. Rohmiller, 214 Kan. 905 (1974), you expressed belief that such documents should be protected from discovery, since they reflect the mental processes by which the assessment was ascertained. We are unable to agree with this analysis, and are, therefore, of the opinion that the assessing officer's field notes are properly discoverable in a suit to recover taxes paid under protest.

You have relied on the above-cited cases as supporting your contention that, as an administrative officer, a tax appraiser should be protected from discovery regarding the mental processes by which his conclusions were reached. Because the appraiser's field notes and memoranda may reflect the protected mental process, the argument continues, such notes should likewise be protected from discovery. We agree that these cases preclude the discovery of the mental processes employed by a state administrative official in his decision making. However, without determining whether the Sebits and Mobil cases can be construed as precluding discovery of a county assessor's mental processes in assessing property for taxation, we disagree with your contention that discovery of an assessor's field notes and memoranda would be tantamount to discovery of the assessor's mental processes.

K.S.A. 79-2005 provides the authority for and prescribes the method of a taxpayer's action to recover taxes paid under protest. The statute, however, fails to set out discovery and evidentiary procedures, and the Kansas Supreme Court has yet to comment on discovery in tax refund cases. See, e.g., Sybrant v. Williams, 206 Kan. 469 (1971), in which the court found moot the issue of the discovery of the county assessor's "ratio study cards" allowed by the district court. We find it reasonable to assume, therefore, that in the absence of statutory or case law to the contrary, the discovery rules provided by the Rules of Civil Procedure would apply in such actions.

K.S.A. 60-226 allows discovery by the parties "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." If, in a suit to recover taxes paid under protest, the taxpayer is challenging the validity of the taxes assessed against him, the factors used as the basis for the decision would indeed be relevant to his claim. It is well-settled that the courts will not interfere with a tax assessment unless the assessing officer acted without authority or in so arbitrary and unreasonable a manner as to amount to constructive fraud. Cities Service Oil Co. v. Murphy, supra at 289. For the assessing official to be acting within the scope of his authority, he must have made the assessment in accordance with the standards prescribed in K.S.A. 79-503. Garvey Grain, Inc. v. MacDonald, 203 Kan. 1, 14 (1969). To ascertain compliance with these standards, it would be necessary to determine the factors considered in reaching the assessment. Without discovery of the assessor's notes, this might be impossible. Thus, to deny discovery to

the protesting taxpayer would, in fact, be forcing him to "trial by ambush." Equal Employment Opportunity Commission v. Los Alamos Construction, Inc., 382 F. Supp. 1373 (D.C.N.M., 1974).

The New Mexico Court of Appeals has recognized the importance of discovery to the protesting taxpayer. In Matter of Protest of Miller, 88 N.M. 492, 542 P.2d 1182, 1185 (Ct. App., 1975), the court held the state's rules of civil procedure applicable to tax protest suits, so that the taxpayer could learn the basis on which the contested assessment was made. A subsequent New Mexico case, First National Bank v. Bernalillo County Valuation Protest Board, 90 N.M. 110, 560 P.2d 174, 177 (Ct. App., 1977), affirmed the Miller holding, noting that the "[r]ight to a fair hearing presupposes that the taxpayer has been informed, prior to the hearing, of the method of valuation used by the county assessor. Otherwise, he cannot be expected to intelligently protest an assessment made . . . ." Without ability to discover what was considered in making the assessment, the protesting taxpayer is clearly unable to show any error and has lost his case before his trial has begun.

Even assuming arguendo that the weight given each factor would be protected from discovery as probing the assessor's mental process, the Kansas cases would not preclude the discovery of the factual basis of such assessment. In Sebits v. Jones, supra at 438, the court held that an "administrative officer . . . cannot be questioned as to the precise factual basis of his findings or conclusions or the precise factual details which influenced his findings or conclusions." However, the court's language tends to acknowledge the discoverability of the factual basis of the assessment, even though how each factor was weighed and considered by the assessor is not. In the Mobil case, the court affirmed Sebits and also held an administrative officer's mental process exempt from discovery, relying on Chicago, B. and Q. Ry. Co. v. Babcock, 204 U.S. 585, 593 (1907). In Babcock, the probing of mental processes was declared improper, with the Court noting that the administrative board's record would be the best evidence as to its decisions and acts. In our view, such statement by the U.S. Supreme Court also would support the discovery of written documents, such as the assessor's notes and memoranda, even though it would be improper to question the weight and reliance placed by the assessor on such documents.

From the foregoing we have concluded that the tax assessor's field notes and memoranda would reflect, to some extent, the factual basis of an assessment and would not necessarily reflect the weight accorded each factor by the assessor. Consequently, discovery of the assessor's field notes would disclose the factual basis underlying the assessment, not the assessor's mental process involved in reaching the assessment. Thus, it is our opinion that, because the assessor is required to consider the factors enumerated in K.S.A. 79-503, documents such as the assessor's field notes which tend to show whether these factors were in fact considered in making the assessment, would be properly discoverable by a protesting taxpayer in an action under K.S.A. 79-2005.

Very truly yours,

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