



SEE ALSO, Berkley
3A Investors, Ltd. v
Jackson County, No
63,326, slip op. (Kan.
App. Sept. 15, 1989)

STATE OF KANSAS

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April 10, 1987

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ATTORNEY GENERAL OPINION NO. 87- 68

Dixie Rose
Butler County Register of Deeds
Butler County Courthouse
P.O. Box 50
El Dorado, Kansas 67042

Re: Taxation--Mortgage Registration and Intangibles;
Mortgage Registration--Refunds

Synopsis: Mortgage registration fees which are voluntarily paid by the taxpayer without mistake, duress or fraud on the part of the county are not refundable. However, in situations which involve county mistake, duress or fraud, the taxpayer is entitled to initiate the protest procedures set forth in K.S.A. 1986 Supp. 79-2005 and 79-1702. Upon an order issued by the board of tax appeals pursuant to K.S.A. 1986 Supp. 79-2005 or 79-1702, the county treasurer is the official authorized to process the refund. Cited herein: K.S.A. 1986 Supp. 79-1702; 79-2005; 79-3102; K.S.A. 79-3104.

* * *

Dear Ms. Rose:

As Register of Deeds for Butler County and President of the Register of Deeds Association of Kansas, you request our opinion regarding mortgage registration fee refunds. Specifically, your questions are as follows: 1) If at the time of tendering a mortgage for filing the secured party fails to provide the proper affidavit to qualify for the exemption from mortgage registration tax pursuant to K.S.A.

1986 Supp. 79-3102(d)(3), is that mortgagee entitled to a refund of any overpaid tax at the time of submitting such affidavit? 2) What official is authorized by statute to refund mortgage registration taxes? 3) Is there a time limitation imposed on the secured party for obtaining a refund? 4) If a refund of mortgage registration tax is made because the filing is exempt from mortgage registration pursuant to K.S.A. 1986 Supp. 79-3102(d)(3), must an instrument be recorded reflecting that the mortgage in question is not an additional lien on the property described therein? We will address your questions in the order in which they were asked.

K.S.A. 1986 Supp. 79-3102 provides in part as follows:

"(a) Before any mortgage of real property, or renewal or extension of such a mortgage, is received and filed for record, there shall be paid to the register of deeds of the county in which such property or any part thereof is situated a registration fee of \$.25 for each \$100 and major fraction thereof of the principal debt or obligation which is secured by such mortgage, and upon which no prior registration fee has been paid.

. . . .

"(d) No registration fee whatsoever shall be paid, collected or required for or on:
(1) Any mortgage or other instrument given solely for the purpose of correcting or perfecting a previously recorded mortgage or other instrument; (2) any mortgage or other instrument given for the purpose of providing additional security for the same indebtedness, where the registration fee herein provided for has been paid on the original mortgage or instrument; (3) any mortgage or other instrument upon that portion of the consideration stated in the mortgage tendered for filing which is verified by affidavit to be principal indebtedness covered or included in a previously recorded mortgage or other instrument with the same lender or their

assigns upon which the registration fee herein provided for has been paid; . . . "

The mortgage registration fee collected by the register of deeds is to be credited to the county general fund by the county treasurer. K.S.A. 79-3104.

The Kansas Supreme Court has consistently held that the mortgage registration fee is a tax, National Bank of Tulsa v. Warren, 177 Kan. 281, 284, 285 (1955); Missouri Pacific Railroad Co. v. Deering, 184 Kan. 283, 286 (1959); Meadowlark Hill, Inc. v. Kearns, 211 Kan. 35, 40, 41 (1973); Misco Industries Inc. v. Board of Sedgwick County Comm'rs, 235 Kan. 958, 961, (1984). As such, mortgage registration fees may be protested pursuant to K.S.A. 79-2005. Meadowlark, supra at 44.

The Court has also recognized that K.S.A. 79-1702 may serve as a substitute for K.S.A. 79-2005. Misco Industries, 235 Kan. at 967; Wirt v. Esrey, 233 Kan. 300, 315 (1983); Kaw Valley Drainage Dist. v. Zimmer, 141 Kan. 620 (1935). The Misco case involved a protest of mortgage registration fees. In Wirt the Court stated as follows:

"Although the county suggests otherwise, it has long been recognized in this jurisdiction that K.S.A. 79-2005 is not the exclusive means of seeking a refund of taxes from BOTA. Indeed, the Kansas Supreme Court, in 1935, recognized that K.S.A. 79-1702 could serve as a substitute for K.S.A. 79-2005. Kaw Valley Drainage Dist. v. Zimmer, 141 Kan. 620, 42 P.2d 936 (1935). In an opinion affirming the district court's decision requiring the county treasurer to comply with an order issued by the state tax commission, the supreme court, considering whether the commission could order a refund of taxes illegally levied and paid, said:

"On this question of law, certain pertinent sections of the tax law will require examination. R.S. 79-1702, in substance, provides that where a taxpayer has a grievance not otherwise remediable

he can have redress through the state tax commission, which is given power, among other matters, to order a refund of the amount found to have been unlawfully charged and collected. R.S. 1933 Supp. 79-2005 also directs what preliminary steps a protesting taxpayer shall take to perfect his right to recover taxes illegally exacted. Of what avail would it be for him to conform to these steps if they were not intended by the legislature to lead to their logical fruition?' p. 624.

"This rule of law has been supported on several occasions, finding the remedy provided under K.S.A. 79-2005 is not an exclusive remedy. Panhandle Eastern Pipe Line Co. v. Herren, 207 Kan. 400, 403, 485 P.2d 156, modified 208 Kan. 119, 490 P.2d 416 (1971); 9 Kansas Digest, Taxation §543 (1971)." 233 Kan. at 315.

Attorney General Opinion No. 76-269 concluded that the board of tax appeals could order a refund of mortgage registration taxes pursuant to K.S.A. 1975 Supp. 79-1702. However, that opinion concerned the exemption from mortgage registration tax currently found at K.S.A. 1986 Supp. 79-3102(d)(2). We are presently concerned with the exemption located at subsection (d)(3) which, contrary to (d)(2), requires the filing of an affidavit verifying that the mortgage covers principal indebtedness included in a previously recorded mortgage with the same lender upon which the registration fee has been paid. For our purposes then, the question becomes whether an overpayment of mortgage registration tax due to the mortgagee's failure to file with the mortgage an affidavit as required by K.S.A. 1986 Supp. 79-3102(d)(3) is remediable by K.S.A. 1986 Supp. 79-1702 or 79-2005.

In the scenario you describe, the mortgage registration fee assessed is accurate based on the information provided the register of deeds by the taxpayer at the time of filing. In other words, any error which arises is not due to a mistake on the part of the register of deeds. The error arises either because the taxpayer is ignorant of the exception granted by K.S.A. 1986 Supp. 79-3102(d)(3), or because, due to timely filing concerns, the taxpayer is compelled to file the mortgage without the companion affidavit. In either case, the error is the taxpayer's, not the county's.

In Palmer v. First National Bank of Kingman, 10 Kan. App. 2d 84 (1984), the Kansas Court of Appeals stated:

"One who pays a tax voluntarily, that is, without compulsion or duress, has no valid claim for its repayment. State, ex rel., v. Board of County Comm'rs, 172 Kan. 601, 242 P.2d 527 (1952); Washington Township v. Hart, 168 Kan. 650, 215 P.2d 180 (1950). This is what is known as the 'volunteer rule,' which provides that a party who, without mistake, fraud, or duress, voluntarily pays money on a demand which is not enforceable against him, cannot recover the amounts paid. In re Fees of State Bd. of Dentistry, 84 N.J. 582, 588, 423 A.2d 640 (1980). This is because every man is supposed to know the law, and if he voluntarily makes a payment which is not compelled to be made by him under the law, he cannot afterward assign ignorance of the law as a reason why he should be furnished with legal remedies to recover it. Johnson Controls v. Carrollton-Farmers, Etc., 605 S.W. 2d 688, 689 (Tex. Civ. App. 1980); In re Fees of State Bd. of Dentistry, 84 N.J. 582. In contrast, where one makes a payment under duress, a valid claim for repayment does exist. Bush v. City of Beloit, 105 Kan. 79, 181 Pac. 615 (1919); Jackson County v. Kaul, 77 Kan. 715, 96 Pac. 45 (1908); Johnson Controls v. Carrollton-Farmers, Etc., 605 S.W. 2d 688; Nat'l Biscuit Co. v. State, 134 Tex. 293, 135 S.W.2d 687 (1940); Austin Nat'l Bank v. Sheppard, 123 Tex. 272, 71 S.W.2d 243 (1934)." 10 Kan. App. 2d at 90.

Based on the above-quoted language, it is our opinion that if the mortgage registration fee is paid because the taxpayer is unaware of the K.S.A. 1986 Supp. 79-3102(d)(3) exemption, it is not refundable in that it was voluntarily paid without mistake, fraud or duress on the part of the county. If, however, the fee is paid under duress due to the county's mistake or fraud, the taxpayer is entitled to the protest procedures set forth in K.S.A. 1986 Supp. 79-2005 and 79-1702.

In answer to your second inquiry, if a mortgage registration tax is properly protested under K.S.A. 1986 Supp. 79-2005 and refund is ordered by the board of tax appeals, the county treasurer is the official statutorily required to refund the overpaid tax. K.S.A. 1986 Supp. 79-2005(k). If the tax is refundable pursuant to K.S.A. 1986 Supp. 79-1702 and the board of tax appeals orders refund, presumably the same procedure should be followed.

K.S.A. 1986 Supp. 79-2005 sets specific time limits for protesting a tax. According to subsection (a), before protesting the payment of taxes the taxpayer must, either at the time of paying such taxes, or, if the whole or part of the taxes are paid prior to December 20, no later than December 20, file a written statement with the county treasurer stating the grounds for protest. [It is interesting to note that the court has held the December 20 deadline to apply to mortgage registration fees. In other words, the taxpayer does not necessarily have to protest at the time of payment; he has until December 20 to do so. City of Lenexa v. Board of Johnson County Commissioners, 237 Kan. 782, 786 (1985).] Within 30 days after filing the written statement of protest, the taxpayer must file an application for refund with the state board of tax appeals. K.S.A. 1986 Supp. 79-2005(e).

K.S.A. 1986 Supp. 79-1702 states that "[n]o tax grievance shall be considered by the board of tax appeals unless the same is filed within three years from the date the tax would have become a lien on real estate, . . . and in no event shall the board order a refund of taxes . . . that extends back more than three years from the date of the most recent tax year. . . ." These time limitations may be waived upon a finding by the board of excusable neglect or undue hardship, or unanimous consent of the board of county commissioners respectively.

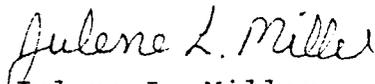
Finally, you question whether an instrument must be recorded reflecting that a mortgage filed pursuant to the K.S.A. 1986 Supp. 79-3102(d)(3) exemption is not an additional lien on the property it describes. Before a refund would be forthcoming, the affidavit verifying that mortgage registration fees had already been paid on the principal indebtedness involved therein would have to be filed with the register of deeds. This affidavit, together with the mortgage, should be sufficient to indicate that the mortgage does not represent a new and different security interest in the property described therein.

In conclusion, mortgage registration fees which are voluntarily paid by the taxpayer without mistake, duress or fraud on the part of the county are not refundable. However, in situations which involve county mistake, duress or fraud, the taxpayer is entitled to initiate the protest procedures set forth in K.S.A. 1986 Supp. 79-2005 and 79-1702. Upon an order issued by the board of tax appeals pursuant to K.S.A. 1986 Supp. 79-2005 or 79-1702, the county treasurer is the official authorized to process the refund.

Very truly yours,



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