



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

November 6, 1990

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 90- 121

Vernon L. Steerman
Osborne County Attorney
Courthouse, 2nd Floor
Osborne, Kansas 67473

Re: Taxation -- Collection and Cancellation of Taxes --
Voluntary Transfer of Personal Property Before Tax
Paid; Lien

Synopsis: Property taxes assessed before the commencement of
a bankruptcy action which are last payable without
penalty after one year before the filing of the
petition are not dischargeable and have priority
status. If the county fails to file a claim for
such taxes, or such a claim is denied, the county
may, in certain circumstances, proceed against the
property pursuant to K.S.A. 79-2111 or 79-2020. In
our opinion, these avenues of recourse are not
available to Osborne county in this case. Cited
herein: K.S.A. 79-301; 79-1804; 79-2004a; 79-2020;
79-2101; 79-2109; 79-2110; 79-2111; 11 U.S.C. §§
507; 523.

* * *

Dear Mr. Steerman:

As Osborne county attorney, you request our opinion
regarding collection of 1984 taxes assessed against the
personal property of an entity which has filed bankruptcy.
The pertinent facts are as follows:

January 1, 1984 - taxes assessed. K.S.A.
79-301.

- April 16, 1984 - taxpayer executes personal property statement.
- October 1, 1984 - taxpayer files bankruptcy.
- November 1, 1984 - taxes become due. K.S.A. 79-1804.
- December 20, 1984 - taxes begin to accrue interest for failure to pay first half. K.S.A. 79-2004a.
- February 19, 1985 - last day to file claim with bankruptcy court. Trustee's Objection to Claim.
- March 22, 1985 - tax warrant issued. K.S.A. 79-2101.
- April 1, 1985 - county given notice of bankruptcy proceeding by taxpayer's attorney.
- April 17 (or 22), 1985 - county files proof of claim with bankruptcy court.
- May 1, 1985 - Notice of Intended Sale of property against which taxes were assessed "free and clear of all liens and encumbrances" mailed to "all parties in interest."
- May 24 (or 28), 1985 - property in question sold to creditor in bankruptcy proceeding. Trustee's Deed.
- February 7, 1986 - trustee files objection to county's claim (asserts claim filed too late).
- February 9, 1986 - county receives Trustee's Objection to Claim.
- February 18, 1986 - last day to respond to Objection to Claim (no response so objection is sustained).
- April 14, 1986 - county receives Order of Objection (objection sustained; county may not participate in distribution to creditors).

Some of the documents you have provided are not fully executed or are otherwise incomplete. We thus assume the accuracy of the above-stated facts.

Property taxes, not otherwise disallowed, which are assessed before the commencement of a bankruptcy case and which are last payable without penalty after one year before the date of the filing of the petition are not dischargeable in a bankruptcy proceeding, and are given priority status. 11

U.S.C. §§ 523(a)(1)(A) and 507(a)(7)(B). See In Re White Hat Feed, Inc., 67 B.R. 851, 855 (Bkrtcy. D.Kan. 1986); Palmer v. First Nat'l Bank of Kingman, 10 Kan.App.2d 84, 88 (1984). In this case, the 1984 taxes were assessed January 1, 1984 and last became due without penalty on December 20, 1984. Bankruptcy was filed October 1, 1984. Thus, the taxes in question fall squarely within the parameters of 11 U.S.C. § 507(a)(7)(B) and would have had priority status. See In Re Kamstra, 51 B.R. 826, 833 (Bkrtcy. W.D. Mich. 1985). However, it appears that the county's claim in this case was foreclosed by the bankruptcy court's Order of Objection - since the county failed to respond to the trustee's objection to its claim, the bankruptcy court sustained the trustee's objection and precluded the county from participating in the distribution of the bankruptcy estate.

Nevertheless, as noted above the taxes in question were not dischargeable and "[t]he failure of a creditor to file a claim as to a debt which is excepted from bankruptcy discharge does not bar the creditor from proceeding against the debtor or the debtor's property." Palmer, 10 Kan.App.2d at 89 (emphasis in original). See also In Re White Hat Feed, Inc., 67 B.R. at 855. Several Kansas statutes provide for actions against personal property to collect taxes owed thereon. K.S.A. 79-2109 and 79-2110 both provide for the creation of a lien on personal property which is subject to bulk sale after the property is assessed but before taxes are paid. See Andrews v. Hunter, 122 Kan. 325, 326 (1927). The Kansas Supreme Court has held that these statutes are not applicable if the entity selling the property was not the owner of the property at the time it was assessed. Robbins-Leavenworth Floor Covering, Inc. v. Leavenworth Nat'l Bank & Trust Co., 229 Kan. 511, 514 (1981); Palmer 10 Kan.App.2d at 87. Since the trustee sold the property in question, and the debtor was the owner of the property at the time it was assessed, K.S.A. 79-2109 and 79-2110 cannot be used to pursue the 1984 taxes. See Palmer, 10 Kan.App.2d at 87, 88.

K.S.A. 79-2020 creates a lien on personal property which is transferred "by voluntary repossession or any other voluntary act in reduction or satisfaction of indebtedness" after the date the property is assessed but before the tax thereon is paid. The United States District Court for the district of Kansas has stated that K.S.A. 79-2020 "is broad enough to encompass the situation . . . where the debtor files bankruptcy, thereby 'surrendering' or 'transferring' all of

his assets to the bankruptcy estate." In Re Knights Athletic Goods, Inc., 98 B.R. 553, 556 (D.Kan. 1989). However, K.S.A. 79-2020 was enacted in the 1985 legislative session and did not take effect until July 1, 1985. The taxes here in question were assessed January 1, 1984, became due November 1, 1984, payable December 20, 1984, and the sale took place in May of 1985, all before the statute took effect. Further, K.S.A. 79-2020 specifically states that "[n]o personal property which has been assessed shall be liable for the tax in the hands of the transferee after the expiration of three years from the time such tax originally became due and payable." Thus, we do not believe K.S.A. 79-2020 is available in this case.

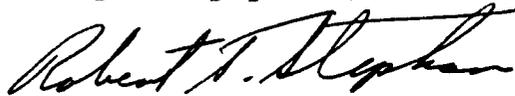
Finally, K.S.A. 79-2111 provides the county with recourse in situations where personal property is "seized by any legal process" for taxes assessed on that property. In Palmer, the Kansas Court of Appeals held that a bankruptcy proceeding meets the description of the term "legal process" as established by the Kansas Supreme Court in Robbins, and that therefore K.S.A. 79-2111 was available to the county in its attempt to collect taxes assessed on personal property sold by a creditor, pursuant to the bankruptcy court's authorization, to reduce the debtor's indebtedness. Palmer, 10 Kan.App.2d at 89, 90. Pursuant to this decision, it appears that K.S.A. 79-2111 is available to Osborne county in its attempt to collect the taxes in question. [We note that the United States Bankruptcy Court for the district of Kansas disagrees with the Kansas Court of Appeals' decision in Palmer and has declined to follow that decision. In Re White Hat Feed, Inc., 67 B.R. 851, 854, 855 (Bkrtcy. D.Kan. 1986) (debtor's petition in bankruptcy is a voluntary surrender of collateral rather than a "seizure" by legal process).] While in the instant case it was the trustee who sold the property rather than a creditor, we do not believe this distinction requires a different conclusion. We find no statute of limitations or case law limiting the use of K.S.A. 79-2111; however, Palmer indicates that the seller of the property has the obligation to ensure payment to the county for such taxes. 10 Kan.App.2d at 90, 91. In this case, the seller was the trustee, the debtor has since been discharged in bankruptcy, and the estate no longer exists. Thus it appears that the county may be precluded from proceeding under this statute as well.

You also inquire by what statutory authority Osborne county may abate the personal property taxes, interest and penalties if found to be uncollectible. As noted in Attorney General

Opinion No. 87-21, Kansas statutes do not provide for abatement or removal of taxes from the books in situations such as this. See K.S.A. 79-1703(a). Counties may therefore wish to seek such legislation.

In conclusion, property taxes assessed before the commencement of a bankruptcy action which are last payable without penalty after one year before the filing of the petition are not dischargeable and have priority status. If the county fails to file a claim for such taxes, or such a claim is denied, the county may still proceed against the property pursuant to K.S.A. 79-2111 or 79-2020. In our opinion, these avenues of recourse are not available to Osborne county in this case.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Julene L. Miller
Deputy Attorney General

RTS:JLM:bas