



STATE OF KANSAS

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April 11, 1991

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ATTORNEY GENERAL OPINION NO. 91- 39

Michael C. Hayes
Jackson County Attorney
Jackson County Courthouse
Room 205
Holton, Kansas 66436

Re: Taxation--Property Exempt From Taxation--Property
Located on Federally Recognized Indian Reservation

Synopsis: Jackson county is authorized to tax real estate and personal property owned in fee by non-Indians and located within the boundaries of the Potawatomi Indian reservation, but may not tax tribal property located within the reservation. K.S.A. 79-1702 may be utilized to cancel or refund unlawfully charged or collected taxes. Cited herein: K.S.A. 79-1701; 79-1702.

* * *

Dear Mr. Hayes:

As attorney for Jackson county you request our opinion regarding the county's ability to tax property within the Potawatomi Indian reservation.

You first ask whether Jackson county has "authority to tax real estate owned by Indians within the boundaries of the Potawatomi Indian Reservation." The United States Supreme Court has consistently held that "absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands. . . ." Mescalero Apache Tribe v.

Jones, 411 U.S. 145, 148, 36 L.Ed.2d 114, 119, 93 S.Ct. 1267 (1973). See McClanahan v. Arizona Tax Commission, 411 U.S. 164, 171, 36 L.Ed.2d 129, 135, 93 S.Ct. 1257 (1973); Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 476, 480, 48 L.Ed.2d 96, 108, 110, 96 S.Ct. 1634 (1976). We are unaware of any federal legislation or treaty which would permit Jackson county or the state of Kansas to tax tribally owned real estate located within the Potawatomi Indian reservation. Thus, in our opinion, Jackson county is not authorized to tax such real estate.

You next ask whether Jackson county has "authority to tax real estate owned by non Indians within the boundaries of the Potawatomi Indian Reservation." You state that approximately 70 per cent of the land within the reservation is owned by non-Indians. Generally, the grantee of allotted Indian land does not take on the Indian/grantor's immune status. 71 Am.Jur.2d State and Local Taxation, § 236 (1973). We believe the same would be true for any Indian lands alienated in fee to non-Indians. See Utah & Northern Railway Co. v. Fisher. 116 U.S. 28, 29 L.Ed. 542, 6 S.Ct. 246 (1885); Maricopa & P. Railroad Co. v. Arizona, 156 U.S. 347, 39 L.Ed. 447, 15 S.Ct. 391 (1895); Thomas v. Gay, 169 U.S. 264, 274, 42 L.Ed. 740, 744, 18 S.Ct. 340 (1897); D. Israel, T. Smithson, "Indian Taxation, Tribal Sovereignty and Economic Development," 49 N.D.L. Rev. 267, 288 (1973) ("once the land is transferred to non-Indian owners, it should no longer be immunized from taxation"). See also Fort Mojave Tribe v. San Bernardino County, 543 F.2d 1253, 1257 (9th Cir. 1976) (upheld possessory interest tax imposed by county on non-Indian lessees of Indian land); Agua Caliente Band of Mission Indians v. County of Riverside, 306 F.Supp. 279, 284 (1969) (the economic advantage or value of the tax immunity is one that can be exploited solely by the Indian and then only during the trust period; conveyance of the fee transfers neither immunity nor exemption).

We are aware of provisions in the Kansas organic act and admission act which state that certain territories might not be included in the boundaries of the territory or state of Kansas. However, both § 19 of the organic act to organize the territory of Kansas and § 1 of the act for the admission of Kansas into the union specify that only territory which by treaty is not to be included within the territorial or state boundaries will be excepted out of such boundaries. The treaties of 1846 and 1861 do not exclude the Potawatomi reservation from the boundaries of the territory or state of

Kansas. Thus, we do not believe that land inside the Potawatomi reservation is necessarily entitled to tax immunity if it is no longer owned by the tribe or its members. Parker v. Winsor, 5 Kan. *364, *367 (1870); Douglas County v. Union Pac. Ry. Co., 5 Kan. *616 (1870).

Another indication that these provisions do not stand for the proposition that the Potawatomi reservation is completely outside the boundaries of the state of Kansas is the recent Kansas Court of Appeals decision in State v. Oyler, 15 Kan.App.2d 78 (1990). In that case, though sovereign immunity under the two acts was raised, the court held the state has jurisdiction to tax the sale of cigarettes sold on reservation land to non-tribal members and non-Indians. See also Moe v. Salish and Kootenai Tribes, supra; Washington v. Confederated Tribes, 447 U.S. 134, 65 L.Ed.2d 10, 100 S. Ct. 2069 (1980); Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, No. 89-1322, slip op. (U.S. Feb. 26, 1991).

Your third question is whether personal property located within the boundaries of the reservation and owned by non-Indians is immune from the state's personal property taxes. The court's have held that personal property owned by Indians residing on the reservation and which is principally located on the reservation is immune from taxation. Moe v. Salish Kootenai Tribes, 425 U.S. at 480, 481, 48 L.Ed.2d at 110, 111; Bryan v. Itasca County, 426 U.S. 373, 377, 48 L.Ed. 2d 710, 714, 96 S.Ct. 2101 (1976); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 162-164, 65 L.Ed.2d at 35, 36. Conversely, personal property owned by non-Indians, though located within an Indian reservation, has been held subject to state and local taxation if such taxes do not interfere with tribal government. Thomas v. Gay, 169 U.S. at 273, 274, 42 L.Ed.2d at 744; Cotton Petroleum Corp. v. New Mexico, 490 U.S. _____, 104 L.Ed.2d 209, 109 S.Ct. _____ (1989) (footnote no. 4 indicates that one of the state taxes at issue and upheld in this case was an ad valorem property tax on equipment). This last case appears to answer your fourth question as well: "Does personal property include commercial equipment or property used in a commercial business?" Cotton Petroleum Corp. is a commercial enterprise. The court found that the state could tax its commercial equipment under the circumstances presented.

Your final questions concern the procedures available to correct improper imposition of taxes on Indian property. You

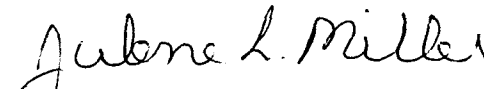
ask whether K.S.A. 79-1701 may be used to correct any errors. K.S.A. 79-1701 provides for correction of "clerical errors." Unless the property in question was previously granted a tax exemption by the state board of tax appeals, we do not believe the situation you question fits within the parameters of K.S.A. 79-1701. However, any tax grievance not remediable under the provisions of K.S.A. 79-1701, and not involving errors committed in the valuation and assessment process, may be remedied pursuant to K.S.A. 79-1702. This statute authorizes the state board of tax appeals to cancel the tax, if uncollected, or to refund the amount found to have been unlawfully charged and collected. Pursuant to K.S.A. 79-1702, the state board may order refunds extending back three years, or more if the board of county commissioners unanimously recommends.

In conclusion, Jackson county is authorized to tax real estate and personal property owned in fee by non-Indians and located within the boundaries of the Potawatomi Indian reservation, but may not tax tribal property located within the reservation. K.S.A. 79-1702 may be utilized to cancel or refund unlawfully charged or collected taxes.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Julene L. Miller
Deputy Attorney General

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