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ATTORNEY GENERAL OPINION NO. 92-12

The Honorable Clyde D. Graeber
State Representative, Forty-First District
State Capitol, Room 502-S
Topeka, Kansas 66612

Re: Taxation--Rules for Valuing Property--Fair Market Value Defined; Factors to be Considered in Determining Fair Market Value; Effect of Failure to Consider Factors

Synopsis: Pursuant to K.S.A. 79-503a and the holding in Garvey Grain, Inc. v. MacDonald, 203 Kan. 1 (1969), guidelines and schedules promulgated by the director of property valuation must reflect, where applicable, realistic market-place depreciation, including short and long-term physical deterioration or functional, economic or social obsolescence. Cited herein: K.S.A. 1991 Supp. 79-503a; K.S.A. 79-1439; K.S.A. 1991 Supp. 79-1476; K.S.A. 1968 Supp. 79-503 (repealed L. 1982, ch. 391, § 39).

* * *

Dear Representative Graeber:

You request our opinion regarding application of the factors listed in K.S.A. 1991 Supp. 79-503a in determining the fair market value of property. Specifically your questions are as follows:

"1. Would the legal holding of the Kansas Supreme Court in the case of Garvey Grain, Inc. v. Macdonald, 203 Kan.,

1, 453 P.2d 59, apply with equal force to a substantially similar set of facts in regard to the utilization by certain Kansas county appraisers, along with the division of property valuation, of arbitrary and capricious depreciation factors in the attempt to determine the fair market value of property as required by K.S.A. 1990 Supp. 79-503a?

"2. Considering the language earlier referred to in the Garvey Grain decision, would its legal holding that if the property valuation division guidelines do not make an appropriate distinction, depreciation-wise, between long life items and short life items, render the PVD depreciation schedules arbitrary and capricious because they failed to take into account pertinent market factors which an appraiser should utilize in attempting to determine fair market value pursuant to K.S.A. 79-503?"

K.S.A. 79-1439(a) and K.S.A. 1991 Supp. 79-1476 require that property be appraised at its fair market value in accordance with the provisions of K.S.A. 1991 Supp. 79-503a. K.S.A. 1991 Supp. 79-503a provides as follows:

"'Fair market value' means the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market, assuming that the parties are acting without undue compulsion. For the purposes of this definition it will be assumed that consummation of a sale occurs as of January 1.

"A variance of 10% in any individual appraisal at fair market value shall not be considered willful neglect of the county appraiser's duty to achieve fair market value. The foregoing provision shall not be construed to mean that a series of such variances does not constitute willful neglect.

"Sales in and of themselves shall not be the sole criteria of fair market value but shall be used in connection with cost, income and other factors including but not by way of exclusion:

- "(a) The proper classification of lands and improvements;
- "(b) the size thereof;
- "(c) the effect of location on value;
- "(d) depreciation, including physical deterioration or functional, economic or social obsolescence;
- "(e) cost of reproduction of improvements;
- "(f) productivity;
- "(g) earning capacity as indicated by lease price or by capitalization of net income;
- "(h) rental or reasonable rental values;
- "(i) sale value on open market with due allowance to abnormal inflationary factors influencing such values;
- "(j) restrictions imposed upon the use of real estate by local governing bodies, including zoning and planning boards or commission; and
- "(k) comparison with values of other property of known or recognized value. The assessment-sales ratio study shall not be used as an appraisal for appraisal purposes.


"The appraisal process utilized in the valuation of all real and tangible personal property for ad valorem tax purposes shall conform to generally accepted appraisal procedures which are adaptable to mass appraisal and consistent with the definition of fair market value unless otherwise specified by law."
(Emphasis added).

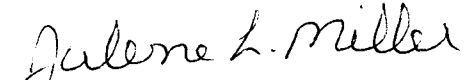
In Garvey Grain, Inc. v. MacDonald, 203 Kan. 1 (1969) the court considered the necessity of applying factors listed in K.S.A. 79-503, as amended by L. 1965, ch. 515, § 1. In the 1982 session, the legislature repealed K.S.A. 79-503 (L. 1982, ch. 391, § 39) and enacted K.S.A. 79-503a (L. 1982, ch. 391, § 2). The two statutes differ in many respects, but for purposes of this opinion we believe the analysis of Garvey Grain applies equally to K.S.A. 79-503a. See Board of Johnson County Comm'rs v. Greenhaw, 241 Kan. 119, 126 (1987).

Garvey Grain and its progeny set forth the following principles: 1) The assessment and valuation of property are administrative functions, not judicial ones, and courts will not substitute their judgment for that of the assessing authority in the absence of fraud, corruption or conduct so oppressive, arbitrary or capricious as to amount to constructive fraud [Garvey Grain, 203 Kan. at 13, Northern Natural Gas Co. v. Dwyer, 208 Kan. 337, 341 (1971), Northern Natural Gas Co. v. Williams, 208 Kan. 407, 413 (1972)]; 2) where state and local officials do not perform their duties in accordance with law, the issue is not the exercise of administrative judgment, but rather the legality of the acts [Garvey Grain, 203 Kan. at 13]; 3) the factors listed in K.S.A. 79-503a must be considered -- an intentional or gross disregard of such factors may amount to constructive fraud [Northern Natural, 208 Kan. at 355, 356, Northern Natural, 208 Kan. at 417, Garvey Grain, 203 Kan. at 12, 13 ("[a]n assessment of property for taxes must be made in accordance with the provisions of a statute, and it would hardly seem necessary to state that if an assessment schedule failed to direct local taxing officials to consider and apply any pertinent statutory factors in determining justifiable value, the schedule would be erroneous as a matter of law. And if through adherence to that manifestly unlawful schedule, the evidence showed the assessor made a palpably excessive overvaluation of the property to be assessed, such act, although made in good faith, would be illegal and amount to constructive fraud or the equivalent of fraud on the rights of the taxpayer.")]; 4) while all of the factors listed must be considered, not all may be applicable -- what factors apply depends on the individual type of property, after consideration has been given to all of the factors [id.]. Thus, pursuant to K.S.A. 1991 Supp. 79-503a and the holding in Garvey Grain, Inc. v. MacDonald, 203 Kan. 1 (1969), guidelines and schedules promulgated by the director of property valuation must reflect, where applicable, realistic market-place

depreciation, including short and long-term physical deterioration or functional, economic or social obsolescence. (For an example of the court's acknowledgement that depreciation realistically reflect the market place, see Garvey Grain, 203 Kan. at 4.)

Very truly yours,


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