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ATTORNEY GENERAL OPINION NO. 2012- 24

Michael E. Kelly, City Attorney
City of Tonganoxie
512 E. 4th St., P.O. Box 664
Tonganoxie, KS 66086

Re: State Boards, Commissions and Authorities—Court of Tax Appeals—Filing Fee for Appeals

Procedure, Civil—Costs—Municipalities Exempt from Depositing Court Costs

Constitution of the United States—Amendments—Rights and Immunities of Citizens; Equal Protection of the Laws

Constitution of the State of Kansas—Bill of Rights; Equal Rights

Synopsis: K.S.A. 2011 Supp. 60-2005 exempts the state and municipalities from paying docket fees and depositing court costs in "civil actions." An application for tax exemption status filed with the Court of Tax Appeals is not a civil action.

K.A.R. 94-5-8 does not violate the equal protection provisions of the United States and Kansas Constitutions by establishing different filing fees for public schools, nonprofit organizations, and other applicants, including municipalities. Cited herein: K.S.A. 2011 Supp. 60-201; 60-202; 60-203; 60-2005; 74-2426; 74-2433; 74-2433a; 79-213; Kan. Const., Bill of Rights §§ 1 & 2; K.A.R. 94-5-8; U.S. Const., Amend. 14.

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Dear Mr. Kelly:

As the City Attorney for the City of Tonganoxie, you ask whether the Court of Tax Appeals (COTA) may legally charge a city the $400 fee prescribed by K.A.R. 94-5-8(a)(6) for filing a real estate tax exemption application. Specifically, you ask:

(1) Whether K.S.A. 2011 Supp. 60-2005 exempts municipalities from this filing fee;

(2) Whether COTA's filing fee scheme violates the equal protection provisions of the United States and Kansas Constitutions; and

(3) Whether the $400 filing fee is excessive, especially in relation to the value of the land for which the City seeks tax exemption status.

Your first question involves the scope of K.S.A. 2011 Supp. 60-2005. This statute provides that "[t]he state of Kansas and all municipalities in this state . . . are hereby exempt, in any civil action in which such state or municipality is involved, from depositing court costs or paying docket fees prescribed by any other law of this state . . . ." By its terms, this exemption only applies in *civil actions*. And so we must determine whether an application for tax exemption status filed in the Court of Tax Appeals — which is an independent agency and administrative law court[1] — constitutes a "civil action."

Because K.S.A. 2011 Supp. 60-2005 does not define the term "civil action," we look to the ordinary meaning of the term.[2] Black's Law Dictionary defines the word "action" as "a civil or criminal *judicial* proceeding."[3] As the U.S. Supreme Court has observed, "action" ordinarily does not refer to *administrative* proceedings except when used in conjunction with the word "administrative."[4] That is not the case here. Instead, the statute uses the term "civil action," a term that judicial opinions and other statutes frequently distinguish from administrative actions.[5] Given the ordinary meaning of "civil action," we conclude that K.S.A. 2011 Supp. 60-2005 only applies to judicial proceedings.

This, in turn, requires us to determine whether COTA's consideration of a tax exemption application is a judicial or administrative proceeding. A city might argue that proceedings before COTA are judicial proceedings (and therefore civil actions) because

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[1] *See* K.S.A. 2011 Supp. 74-2433a.
[2] *See, e.g.*, *State v. Snellings*, 294 Kan. 149, 158 (2012).
[3] Black's Law Dictionary (9th ed. 2009) (emphasis added).
[4] *See BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006).
[5] *See, e.g.*, *Winston v. SRS*, 274 Kan. 396, 408 (2002) ("An individual's Fifth Amendment right to avoid self-incrimination may be invoked in any proceeding, including civil or administrative."); K.S.A. 41-2904 ("In any civil or administrative action . . ."); K.S.A. 75-4319 (certain records and information "shall not be subject to subpoena, discovery or other demand in any administrative, criminal or civil action").

COTA is a "court" made up of three "judges."[6] This argument finds support in one definition of the word "judicial" as "[o]f, relating to, or by the court or a judge."[7]

While proceedings before COTA might be considered judicial in a certain sense, we think it is very unlikely the legislature intended the meaning of the term "civil action" to depend entirely on the title of the entity conducting the proceeding. After all, COTA was once called the Board of Tax Appeals, and it consisted of "members" not "judges."[8] Tax exemption applications filed with the *Board* of Tax Appeals were surely not "civil actions." We doubt these applications were suddenly transformed into civil actions just because the name of the agency changed.

Not only that, but interpreting the term "civil action" to include any civil proceeding before an entity called a "court" fails to adequately distinguish judicial proceedings from administrative ones. If a judicial proceeding is defined as a proceeding before a court or judge, then an administrative proceeding would be a proceeding "before an administrative agency."[9] And since COTA is an independent agency as well as an administrative law court, this interpretation would classify COTA's consideration of a tax exemption application as *both* a judicial proceeding (which is a "civil action" under the ordinary meaning of the term) *and* an administrative one (which is not). We can therefore dispose of this interpretation of "civil action."

Alternatively, a city might argue that COTA's consideration of a tax exemption application is a "civil action" because COTA is performing a "quasi-judicial" function.[10] In processing these applications, COTA determines facts and applies the law to those facts, which resembles what courts typically do in a civil action.

But COTA tax exemption proceedings are a far cry from the judicial proceedings one usually associates with the term "civil action." Instead, "[m]atters of tax exemptions are administrative in character . . . ."[11] These proceedings ordinarily begin with the property owner filing an "application" for tax exemption status with the relevant county appraiser, who offers a written recommendation to COTA.[12] The application and appraiser's recommendation are then filed with COTA, which ultimately decides whether to grant or deny the request, all pursuant to the Kansas Administrative Procedure Act.[13] Although the county may argue that the tax exemption request should be denied, these proceedings are not adversarial in the same way as ordinary judicial proceedings are.

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[6] K.S.A. 2011 Supp. 74-2433.
[7] *See* Black's Law Dictionary (9th ed. 2009).
[8] *See* K.S.A. 74-2433 (2002 ed.). The Board was renamed the Court of Tax Appeals by L. 2008, Ch. 109.
[9] Black's Law Dictionary (9th ed. 2009) (defining "administrative proceeding").
[10] *See, e.g.*, *Pork Motel, Corp. v. KDHE*, 234 Kan. 374, 383 (1983) ("Quasi-judicial is a term applied to an officer who is empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of a general nature.").
[11] *J. Enterprises, Inc. v. Board of County Comm'rs of Harvey County*, 253 Kan. 552, 566 (1993).
[12] K.S.A. 2011 Supp. 79-213(a)-(d).
[13] K.S.A. 2011 Supp. 79-213(e)-(g); 74-2426.

And, in any event, quasi-judicial proceedings are not the same thing as judicial proceedings. After all, "quasi" generally means "having some resemblance" but not exactly the same as something else.[14] While "administrative agencies such as [the Board of Tax Appeals (now COTA)] may perform quasi-judicial functions reasonably necessary to the proper performance of their *administrative* duties," these agencies are not courts that exercise judicial power under Article III of the Kansas Constitution.[15]

We believe that the term "civil action" only includes proceedings brought in these courts, courts located in the judicial branch of government. This interpretation is consistent with the ordinary meaning of the term. As noted above, "action" generally refers to judicial as opposed to administrative proceedings, and "judicial" can be read in a constitutional sense as referring to the judicial branch.[16] This interpretation is further supported by the Kansas Rules of Civil Procedure, which "govern[ ] the procedure in all *civil actions* and proceedings in the district courts of Kansas."[17] These rules provide that "[t]here is one form of action, the civil action," and that a civil action is commenced by "filing a petition with the court."[18] The fact that these rules and K.S.A. 2011 Supp. 60-2005 are codified in the same chapter suggests that the legislature intended the term "civil action" in K.S.A. 2011 Supp. 60-2005 to refer only to proceedings in the judicial branch. Courts also frequently use the term in this manner, requiring litigants to exhaust their administrative remedies before filing a civil action.[19] This would make no sense if proceedings before administrative agencies *were* civil actions.

To be clear, we do not mean to suggest that *all* non-criminal proceedings in the judicial branch are civil actions.[20] We opine only that the term "civil action" does not refer to proceedings before an administrative agency, however judicial in character. Because the statute creating COTA explicitly states that it is "an independent agency and administrative law court located within the executive branch of state government"[21] and not a court within the judicial branch, its consideration of a tax exemption application is not a "civil action" for purposes of K.S.A. 2011 Supp. 60-2005. Consequently, K.S.A. 2011 Supp. 60-2005 does not exempt municipalities from the filing fees prescribed for such applications.[22]

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[14] http://www.merriam-webster.com/dictionary/quasi; Black's Law Dictionary (9th ed. 2009) ("Seemingly but not actually; in some sense or degree; resembling; nearly."); *see also* http://www.merriam-webster.com/dictionary/quasi-judicial (defining "quasi-judicial" as "essentially judicial in character but not within the judicial power or function especially as constitutionally defined").

[15] *Sage v. Williams*, 23 Kan. App. 2d 624, 627 (1997) (citations omitted, emphasis added); *cf. Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 908-12 (1991) (Scalia, J., concurring).

[16] http://www.merriam-webster.com/dictionary/judicial (among other possibilities, "judicial" can mean "belonging to the [judicial] branch of government" as opposed to the executive or legislative branches).

[17] K.S.A. 2011 Supp. 60-201(b) (emphasis added).

[18] K.S.A. 2011 Supp. 60-202; 203.

[19] *See, e.g.*, *Sandlin v. Roche Labs, Inc*., 268 Kan. 79, 86-88 (1999).

[20] *See, e.g.*, *In re Matter of Condemnation of Land for State Highway Purposes*, 235 Kan. 676, 681 (1984) (an eminent domain proceeding "is a special statutory proceeding, not a civil action covered by the Code of Civil Procedure").

[21] K.S.A. 2011 Supp. 74-2433a.

[22] Because we conclude that COTA tax exemption proceedings are not civil actions, we do not address whether COTA's filing fee is a "docket fee" within the meaning of the statute.

You next ask whether COTA's filing fee scheme, established by K.A.R. 94-5-8, is unconstitutional as a violation of the equal protection provisions of the United States and Kansas Constitutions. You note that although K.A.R. 94-5-8(a)(6) prescribes a $400 filing fee for most tax exemption applications involving real property, public schools are exempt from this fee,[23] while not-for-profit organizations are only required to pay $10 when the value of the property does not exceed $100,000.[24]

The Equal Protection Clause of the U.S. Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[25] The Kansas Constitution contains corresponding provisions that, although phrased quite differently, are generally interpreted in the same manner as the federal Equal Protection Clause.[26] We will address the federal and state aspects of your equal protection question together.

Because the classifications drawn by K.A.R. 94-5-8 do not proceed along suspect lines (such as race or gender)[27] or burden a fundamental right (such as the freedom of speech),[28] these classifications are valid under the Equal Protection Clause as long as there is a "rational relationship between the disparity of treatment and some legitimate governmental purpose."[29] This "rational basis test" is extremely deferential. A challenged law enjoys "a strong presumption of validity" and will stand as long as there is some "plausible reason" for the classification, regardless of "whether the conceived reason for the challenged distinction actually motivated the legislature."[30] It also does not matter whether the classifications are overinclusive or underinclusive as long as they are not arbitrary or irrational.[31]

We will assume, without offering an opinion on the question, that cities are "persons" protected by the Equal Protection Clause. Even so, K.A.R. 94-5-8 easily passes rational basis review. Education is undoubtedly a legitimate governmental interest, and exempting public schools from paying a tax exemption filing fee is rationally related to this interest. Similarly, many nonprofit organizations serve purposes the state may legitimately wish to promote, and establishing a lower filing fee for such organizations is a rational way of doing so. Of course, this classification is both overinclusive and underinclusive — the state may not have a legitimate governmental interest in promoting the goals of certain non-profit organizations, while other entities (including

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[23] K.A.R. 94-5-8(f).
[24] K.A.R. 94-5-8(g).
[25] U.S. Const., Amend. 14.
[26] *State ex rel. Tomasic v. City of Kansas City*, 237 Kan. 572, 583 (1985); Kan. Const., Bill of Rights § 1 ("All men are possessed of equal and inalienable natural rights . . . ."); *Id.* § 2 ("All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit.").
[27] *See, e.g.*, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272-73 (1979).
[28] *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972).
[29] *See Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012).
[30] *F.C.C. v. Beach Commc'ns, Inc*., 508 U.S. 307, 313-14 (1993).
[31] *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93, 108 (1979).

municipalities) may serve some of the same purposes as nonprofit organizations. As we mentioned above, however, rational basis review does not require a perfect fit between the interest to be served and the classification adopted. A law fails rational basis review only if the distinctions it draws are wholly arbitrary or irrational, and that much cannot be said here.

Having identified no equal protection problem with K.A.R. 94-5-8, we turn to your final question — whether the $400 filing fee is "excessive and inconsistent with the effort necessary to process [a tax exemption] application," especially when the two parcels of land for which the city seeks tax exemption status are valued at only $108 and $257, with annual property taxes of $14.54 and $34.60. To the extent you are asking whether the $400 filing fee is greater than the costs of processing a tax exemption application, your question is one of fact. And to the extent you are asking whether the fee is excessive in a normative sense, your question is one of policy. Both of these questions are beyond the scope of a formal Attorney General opinion.[32]

In conclusion, we opine that neither K.S.A. 2011 Supp. 60-2005 nor the equal protection provisions of the United States and Kansas Constitutions prohibit the Court of Tax Appeals from charging municipalities a $400 filing fee for real property tax exemption applications.

Sincerely,

Derek Schmidt
Attorney General

Dwight Carswell
Assistant Attorney General

DS:AA:DC

[32] Attorney General's Statement of Policy Relating to the Furnishing of Written Opinions, ¶ 8 ("Only questions of law will be answered.").