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August 15, 1985

ATTORNEY GENERAL OPINION NO. 85- 100

Victor W. Miller, Director
Division of Property Valuation
Department of Revenue
State Office Building, 2nd Floor
Topeka, Kansas 66625

Re: Taxation -- Collection and Cancellation of Taxes --
Collection of Delinquent Personal Property Taxes;
Authority of County to Defer Payment

Synopsis: Pursuant to K.S.A. 79-1411a, Shawnee County is the primary governmental unit responsible for the collection of personal property taxes within the county. While K.S.A. 79-1703 prohibits a board of county commissioners from releasing, discharging, remitting or commuting personal property taxes, no express prohibition exists against the deferral of such taxes. Further, while K.S.A. 79-2017 provides express provisions for the collection of delinquent personal property taxes in Shawnee County, in addition to these express powers the board of county commissioners also possesses the implied power to take such reasonable means as may be necessary for the effective exercise of the powers conferred and the duties imposed. In a situation where delinquent personal property taxes are owed by a taxpayer who was in bankruptcy before the taxes were assessed, the Shawnee County Board of Commissioners may defer payment of such taxes and accrued interest for a reasonable period of time, but is without the power to release, discharge,

remit, or commute such taxes in the absence of specific statutory authority. Cited herein: K.S.A. 79-1411a; 79-1703; 79-2004a; 79-2017, as amended by L. 1985, ch. 319; 11 U.S.C.A. §§362, 507.

* * *

Dear Mr. Miller:

As Director of the Division of Property Valuation for the Department of Revenue, you request our opinion on a matter which has arisen in Shawnee County. Specifically, you inform us that the Shawnee County Board of Commissioners has entered into an agreement whereby one-half of the delinquent personal property taxes owed by a local television station will be deferred for eighteen months, at which time the amount, together with accrued interest, will be paid in full. You inquire whether, in light of Kansas statutory provisions, the board of county commissioners has the authority to take such action.

We have received detailed statements of the factual background of this situation, together with relevant legal authorities, from both your office and the Shawnee County Board of Commissioners, and we include a brief summary of the facts here. Prior to May of 1985, Mid-America Broadcasting of Topeka, Inc., owned and operated KLDH-TV (Channel 49). Since November of 1983, the corporation had been operating under the provisions of Chapter 11 of the federal bankruptcy code (11 U.S.C.A. §§1101, et seq.), and had seen its financial situation continue to deteriorate. The corporation did not pay personal property taxes which were regularly assessed on December 20, 1984 (pursuant to K.S.A. 79-2004a), and proceedings were instituted to compel payment. Following the issuance of a notice by the county treasurer, a tax warrant was issued to the sheriff, both as set forth in K.S.A. 79-2017, as amended by L. 1985, ch. 319. However, the warrant was not executed to the corporation, due to the automatic stay imposed on such proceedings by the bankruptcy statutes. 11 U.S.C.A. §362(a)(4).

In April of this year, and again in May, the Shawnee County Board of Commissioners entered into agreements with the corporation which deferred one-half of the personal property taxes which were due and owing. Such an arrangement appears to have been initially suggested by the trustee in bankruptcy, who approved fully the plan which was eventually reached.

Under the plan, one-half of the taxes, plus accrued interest from December 20, 1984, were paid immediately to the county. The remaining half, again with accrued interest, was to be deferred for up to 18 months, but would be fully paid at that time, if not before. All parties were quite clear that this arrangement did not constitute an abatement of the taxes, but rather a deferral for a definite time. The initial amount deferred was \$17,341.95, plus accrued interest, however, a subsequent addition of property owned by the company to the tax rolls made the final deferred total \$18,761. With interest, it is estimated that the amount eventually paid will be near \$20,000. Although not at issue here, it is relevant to note that the company requested and received actual abatements of different taxes from two other units of government, namely the City of Topeka and the Department of Revenue.

By the express language of the statutes, Shawnee County is the governmental unit charged with "the primary responsibility for the administration of all laws" concerning the collection of personal property taxes. K.S.A. 79-1411a. This responsibility is not without limits, one of which is imposed by K.S.A. 79-1703(a), which provides in part that:

"no board of county commissioners or other officer of any county shall have power to release, discharge, remit or commute any portion of the taxes assessed or levied against any person or property within their respective jurisdictions for any reason whatsoever."

While it may be argued that the above language proscribes the action taken by the county commission, we note that the words used in the statute ("release, discharge, remit or commute") all refer to reducing the amount of the taxes owed or forgiving them entirely. "Defer" means to postpone, and at least one state court has recognized a distinction between remitting (*i.e.* foregoing) a payment and deferring (*i.e.* postponing) it. Rowlands v. State Loan Board of Arizona, 24 Ariz. 116, 207 Pac. 359 (1922). In addition, the express prohibition of the actions listed in K.S.A. 79-1703(a) implies the exclusion of other, less final actions such as deferral. See, e.g. State v. Wood, 231 Kan. 699, Syl. ¶3 (1982) ("mention or inclusion of one thing implies the exclusion of

others."). Accordingly, we do not believe that K.S.A. 79-1703(a) on its face prohibits the actions taken by Shawnee County.

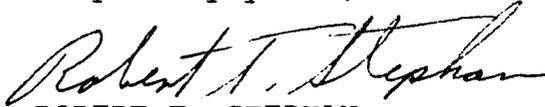
It has also been pointed out that K.S.A. 79-2017, as amended by L. 1985, ch. 319, establishes a detailed set of procedures for the collection of delinquent personal property taxes in Shawnee County, and that this set of procedures does not include the granting of a deferral of the type given here. However, we note that the procedures of the statute were followed, insofar as it was possible to do so, for a notice of delinquency was sent and a tax warrant issued thereafter. However, due to the presence of a Chapter 11 bankruptcy proceeding, no further action could be taken, as those proceedings imposed a stay on any efforts to execute on the warrant. 11 U.S.C.A. §362(a)(4).

Second, the grant of express powers to collect delinquent taxes carries with it the implied power to take such reasonable means as may be necessary to effectively exercise the express powers. Edwards County Comm'rs v. Simmons, 159 Kan. 41, 53 (1944); Yoder v. City of Hutchinson, 171 Kan. 1, 8 (1951). Here, given the presence of a bankruptcy proceeding and the fact that the county was entitled to no priority in the collection of the delinquent taxes [11 U.S.C.A. §507(a)(7)], the county was faced with either deferring collection or collecting little, if any, of the tax owed. In our opinion, the county possessed the implied power to determine how best to collect the taxes which were owed in this situation. While such a power could conceivably be abused under different facts, here we do not believe that the county acted ultra vires in making the arrangement that it did with the company and the trustee.

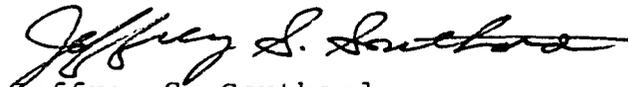
In conclusion, pursuant to K.S.A. 79-1411a, Shawnee County is the primary governmental unit responsible for the collection of personal property taxes within the county. While K.S.A. 79-1703 prohibits a board of county commissioners from releasing, discharging, remitting or commuting personal property taxes, no express prohibition exists against the deferral of such taxes. Further, while K.S.A. 79-2017 provides express provisions for the collection of delinquent personal property taxes in Shawnee County, in addition to these express powers the board of county commissioners also possesses the implied power to take such reasonable means as may be necessary for the effective exercise of the powers

conferred and the duties imposed. In a situation where delinquent personal property taxes are owed by a taxpayer who was in bankruptcy before the taxes were assessed, a board of county commissioners may defer payment of such taxes and accrued interest for a reasonable period of time, but is without the power to release, discharge, remit, or commute such taxes in the absence of specific statutory authority.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
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RTS:JSS:crw