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ATTORNEY GENERAL OPINION NO. 91- 34

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Re: Taxation -- Sale of Personal Property for Taxes --
Collection of Delinquent Taxes; Poverty Affidavit;
Warrant Not Issued or Executed; Effect on Tax Owed

Automobiles and Other Vehicles -- General
Provisions; Registration of Vehicles --
Registration of Vehicles; Proof of Payment of
Personal Property Taxes; Poverty Affidavit Limiting
Issuance or Execution of Tax Warrant

Synopsis: K.S.A. 79-2102 does not authorize the county to
release, discharge, remit or abate taxes owed on
personal property. Rather, it permits impoverished
or infirm taxpayers to temporarily avoid issuance
or execution of a warrant otherwise available
pursuant to K.S.A. 79-2101 et seq. As this
act provides no criteria or guidelines for
determining the existence of poverty or infirmity
in a specific situation, the county treasurer must
accept affidavits sworn to in accordance with that
statute. A court may examine the veracity of or
factual basis for such a sworn statement and may
determine whether perjury, false writing, or false
oath penalties should be imposed, but the treasurer
has no discretion in accepting the statement.
K.S.A. 1990 Supp. 8-173 requires the county
treasurer to decline acceptance of vehicle

registration applications if personal property tax remains unpaid. K.S.A. 79-2102 does not extinguish the obligation to pay personal property tax, and thus, vehicle registration applicants may not rely upon K.S.A. 79-2102 to escape the collection procedures imposed by K.S.A. 1990 Supp. 8-173. The portion of Attorney General Opinion No. 78-391 that conflicts with the opinion expressed herein is hereby withdrawn. Cited herein: K.S.A. 1990 Supp. 8-173; K.S.A. 19-503; 19-515; 21-702; 21-3711; 39-702; K.S.A. 1990 Supp. 60-2001; K.S.A. 61-2501; 77-201; 79-201; 79-1703; K.S.A. 1990 Supp. 79-2004a; 79-2101; K.S.A. 79-2102; 79-2107.

* * *

Dear Ms. Esparza and Mr. Gaffney:

As legal counsel for Harper county, you ask that we address the following questions:

"Whether an affidavit, filed with the county treasurer pursuant to K.S.A. 79-2102, releases or discharges an indigent taxpayer's obligation to the county for delinquent personal property taxes?;

"What duty or action, if any, is required of the county treasurer and/or the county commissioners when 'such affidavits' are submitted?;

"What inquiry, if any, should the county treasurer make to verify the affiant's indigency, and what should be the form of the affidavit?; and

"If an indigent taxpayer files a K.S.A. 79-2102 affidavit and the county treasurer verifies the taxpayer's indigency, and if the indigent taxpayer seeks to register a personal vehicle, how does the county treasurer resolve the conflict between K.S.A. 79-2102 and K.S.A. 8-173 (which prohibits the county treasurer from accepting a vehicle registration application, if any prior year's taxes are unpaid)?"

Article 21 of chapter 79 in the Kansas statutes discusses sale of personal property for taxes. K.S.A. 79-2102 provides:

"If any one to whom such fact is known, or if the person against whom such unpaid tax is charged, shall make and file with the treasurer an affidavit that such person is

unable, by reason of poverty or infirmity, to contribute to the public charge, such warrant shall not be issued or executed. The treasurer shall note such fact on the tax roll opposite such tax, and shall preserve all such affidavits, and shall submit them together with uncollected taxes to the county commissioners. For the purpose specified in this section the county treasurer is authorized to administer oaths."

We note that 1991 House Bill No. 2403 would repeal K.S.A. 79-2102. However, as of yet, this bill has not been enacted.

As you note in your opinion request letter, case law offers no assistance concerning K.S.A. 79-2102. It appears that this statute has been little utilized. It was enacted in 1866 and has not been amended since that time. However, two previously issued Attorney General Opinions discuss K.S.A. 79-2102 and, in part, address the issues you raise.

Attorney General Opinion No. 61-116, III Opinions of the Attorney General 680, examined three issues involving K.S.A. 79-2102: (1) whether the county treasurer has discretion concerning the filing of a poverty affidavit; (2) what constitutes poverty or infirmity for the purposes of the statute; and (3) whether the motor vehicle registration application procedure is affected by filing such a poverty affidavit. Attorney General Opinion No. 78-391 primarily focused upon the motor vehicle registration issue and does not contain a reference to the prior opinion. Attorney General Opinion No. 78-391 directly conflicts with Opinion No. 61-116 with regard to the motor vehicle registration issue. Because of the age of these opinions and the conflict between them, we will address your opinion request without total reliance upon either. However, we enclose copies of these opinions for your information.

K.S.A. 79-2101 et seq. provide for issuance and execution of tax warrants. This warrant procedure is used to collect money otherwise owed pursuant to a properly levied and chargeable tax. Tax debtors who do not pay personal property tax are subject to the warrant procedure set forth at K.S.A. 79-2101 et seq.

K.S.A. 79-2102, while providing a procedure to avoid the warrant procedure, specifically contemplates the procedures utilized to levy or charge personal property taxes by using the language "[a]gainst whom such unpaid tax is

charged. . . ." K.S.A. 79-2102 does not appear to negate the tax procedures prior to execution or issuance of a warrant nor grant the debtor a complete reprieve, exemption, pardon or abatement of the tax otherwise owed. See also K.S.A. 1990 Supp. 79-2004a, interest on unpaid tax. Rather, K.S.A. 79-2102 affects the collection process of raising revenues through taxation. See 84 C.J.S. Taxation, § 640 (1954).

Some states specifically permit complete abatement of unpaid tax pursuant to poverty exemption statutes. See Guzman v. The Board of Assessors Oxford, 506 N.E.2d 1168 (Mass. 1987); Macaro v. Town of Windham, 468 A.2d 604 (Me. 1983). The purpose of poverty or infirmity tax exemptions appears to be a legislative effort to avoid creating public burdens out of persons who are unable to pay tax. See Annot. 123 A.L.R. 597 (1939); Annot. 65 A.L.R.2d 552 (1959); City of Bridgeport v. First National Bank and Trust Company, 7 A.2d 839 (Conn. 1929). Thus, some states allow impoverished or infirm persons a complete exemption from taxation. See also 84 C.J.S. Taxation, § 215 (1954). However, as evidenced by K.S.A. 79-1703, Kansas does not authorize release of a tax due and owing. See Attorney General Opinions No. 91-6, 91-5, 87-21, 85-100, 78-325, 76-158, 76-87 and 74-98. See also K.S.A. 79-201 et seq., tax exceptions or exemptions. K.S.A. 79-2102 merely defers an otherwise available enforcement mechanism, the warrant, which is normally available to assist with collection of unpaid personal property tax.

Thus, in answer to your first question, we concur with your analysis and it is our opinion that K.S.A. 79-2102 does not release, discharge, remit or commute personal property tax. Rather, that statute permits impoverished or infirm taxpayers to temporarily avoid issuance or execution of a warrant otherwise available pursuant to K.S.A. 79-2101 et seq.

Your second and third questions concern procedures and authorities utilized by county officials when presented with an affidavit pursuant to K.S.A. 79-2102. The statutes set forth at K.S.A. 79-2101 et seq. generally direct and concern activities by the county treasurer, the county sheriff and the county attorney. The only references to the board of county commissioners in this act are set forth at K.S.A. 79-2102 and 79-2107. K.S.A. 79-2107 directs the board of county county commissioners to take certain actions with regard to the county sheriff's salary. K.S.A. 79-2102 directs the county treasurer to submit affidavits to the county commissioners together with a tax roll showing the status of tax collections. With the exception of K.S.A. 79-2107, K.S.A. 79-2101 et seq. does not permit or require the county

commissioners to take any positive role or actions with regard to these specific tax collection procedures.

Conversely, K.S.A. 79-2101 et seq. assign many duties to the county treasurer. K.S.A. 79-2102 permits the county treasurer to administer an oath for purposes specified in that statute. A person taking such an oath should be cognizant of possible penalties for making a false writing, statement or oath. See K.S.A. 21-702, 21-3711, 54-104, and 54-105. However, K.S.A. 79-2101 et seq. do not establish any guidelines or criteria for determining the existence of poverty or infirmity. Moreover, we have found no all inclusive statutory authority which defines these terms for purposes of Kansas law.

K.S.A. 77-201 sets forth general statutory construction rules and provides in pertinent part that "words and phrases shall be construed according to the context and approved usage of the language, but technical words and phrases, and other words and phrases that have acquired a peculiar and appropriate meaning in law, shall be construed according to their peculiar and appropriate meanings." K.S.A. 77-201 Second. Poverty is defined as "the state or condition of being poor." Blacks Law Dictionary 1053 (5th ed. 1979). Infirm is defined as "weak, feeble, lacking moral character or weak of health. . . ." Id. at 700. As you note, certain Kansas statutes discuss poverty or infirmity. See K.S.A. 1990 Supp. 60-2001, K.S.A. 61-2501, K.S.A. 39-702 and K.S.A. 1990 Supp. 39-709. Attorney General Opinion No. 61-116 considered the issue of what constitutes poverty or infirmity and stated "there is no concrete yardstick available by which a person can be labeled poverty stricken and thereby unable to contribute to the public charge." Thus, this opinion concluded that "each case would, therefore, be a separate factual situation which in the final instance would have to be decided by a court." We concur with this opinion.

While general legal principles and specific statutes may assist in determining whether an individual suffers from poverty or infirmity, it is unclear from K.S.A. 79-2102 whether the county treasurer is vested with authority to apply such standards to an affiant. You indicate that it is your opinion that K.S.A. 19-515 vests inherent authority in the county treasurer permitting that official to inquire into and verify the affiant's indigency or infirmity. Attorney General Opinion No. 61-116 also examined whether the county treasurer had discretion to allow or decline a filing pursuant to K.S.A. 79-2102. In holding that the county treasurer did not have such authority, then Attorney General William Ferguson examined general legal principles concerning the

difference between the discretionary and ministerial duties of a public officer. Attorney General Opinion No. 61-116 concluded that K.S.A. 79-2102 gave the county treasurer a ministerial duty and thus did not permit an exercise of discretion. See 67 C.J.S. Officers, §§ 199 and 200 (1978).

K.S.A. 79-2101 et seq. and 19-503 et seq. empower the treasurer to collect tax. These duties are not discretionary. It is our opinion that K.S.A. 79-2102 requires the county treasurer to accept a poverty affidavit sworn to in accordance with that statute. If the affiant is not impoverished or infirm, false writing, perjury, and false oath penalties may possibly be imposed by a court. However, it is our opinion that neither K.S.A. 79-2102 nor K.S.A. 19-503 et seq. authorize or require a county treasurer to exercise discretion with regard to making a legal judgment concerning the sufficiency of the grounds for relief permitted by K.S.A. 79-2102. Rather, the county treasurer should accept sworn statements presented pursuant to K.S.A. 79-2102, and, if concerned that the affiant is not entitled to such relief, contact the county attorney concerning the possibility of criminal sanctions for filing a false document or making a fraudulent oath. As no form is suggested by K.S.A. 79-2102, the sworn statement may be drafted by legal counsel to reflect the language set forth in that statute.

The fourth and final issue you raise concerns the relationship between K.S.A. 79-2102 and K.S.A. 1990 Supp. 8-173. As you note, K.S.A. 79-2102 was enacted prior to the existence of motor vehicles, and thus, prior to motor vehicle registration procedures. As previously discussed herein, Attorney General Opinions No. 61-116 and 78-391 directly conflict on the issue of whether K.S.A. 79-2102 allows an individual to register a vehicle without payment of outstanding personal property tax debts. We agree with the conclusions contained in Attorney General Opinion No. 61-116 and hereby withdraw the conflicting portions of Attorney General Opinion No. 78-391.

K.S.A. 1990 Supp. 8-173 provides:

"(a) An application for registration of a vehicle as provided in article 1 of chapter 8 of the Kansas Statutes Annotated and amendments thereto, shall not be accepted unless the person making such application shall exhibit:

"(1) A receipt showing that such person has paid all personal property taxes

levied against such person for the preceding year, including taxes upon such vehicle, except that if such application is made before June 21 such receipt need show payment of only one-half the preceding year's tax; or

"(2) evidence that such vehicle was assessed for taxation purposes by a state agency, or was assessed as stock in trade of a merchant or manufacturer or was exempt from taxation under the laws of this state.

"(3) An application for registration of a vehicle as provided in article 1 of chapter 8 of the Kansas Statutes Annotated shall not be accepted if the records of the county treasurer show that the applicant is delinquent and owes personal property taxes levied against the applicant for any preceding year."
(Emphasis added).

Attorney General Opinion No. 78-391, perhaps in response to a specific situation, gave a charitable interpretation to K.S.A. 79-2102 and concluded that an affidavit accepted pursuant to K.S.A. 79-2102 was evidence that the property was exempt from taxation under the laws of the state. Thus, Attorney General Opinion No. 78-391 read K.S.A. 79-2102 and the motor vehicle registration statute to permit registration because the vehicle assessed was exempt from taxation under the laws of the state. We do not believe this is a correct reading of K.S.A. 79-2102 or the vehicle registration statute, nor can we find other authority exempting from taxation the property or vehicles owned by impoverished persons.

As discussed with regard to the first issue raised herein, K.S.A. 79-2102 permits relief from issuance or execution of a tax warrant. The warrant procedure assists in collection of tax debts. K.S.A. 1990 Supp. 8-173 also gives local tax authorities a collection mechanism. Relief from a specific collection procedure following the levy and assessment of that tax does not discharge or otherwise negate the fact that the tax is due and owing. Rather, it allows the impoverished taxpayer to stay the warrant process and thus protect against loss of personal property. Other collection procedures are not necessarily affected by utilization of K.S.A. 79-2102.

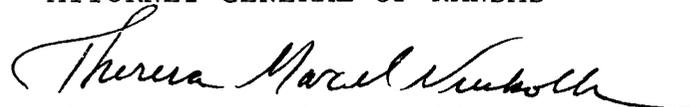
K.S.A. 1990 Supp. 8-173 clearly requires the county treasurer to refuse acceptance of vehicle registration when the records of the county treasurer show that the applicant is delinquent and owes personal property tax. K.S.A. 79-2102 directs the county treasurer to note that a person is unable to pay the tax and stays the warrant procedure. However, it does not allow the county treasurer or other officials to declare that the tax is no longer owing. While some states provide poverty exemptions, we have found no Kansas statute exempting impoverished persons from personal property tax. K.S.A. 79-2102 limits one collection procedure otherwise available to counties. It does not exempt the property from the tax or limit utilization of other tax collection procedures.

We recognize that our interpretation of the relationship between K.S.A. 1990 Supp. 8-173 and 79-2102 permits an impoverished tax debtor to retain possession of a vehicle while prohibiting legal use of that vehicle. The legislature may want to consider the public policy involved in such a situation. However, unless or until a change is made, K.S.A. 79-2102 and K.S.A. 1990 Supp. 8-173 may be read in harmony and, therefore, both must be followed by local authorities.

Thus, it is our opinion that K.S.A. 1990 Supp. 8-173 requires a county treasurer to decline an application for vehicle registration despite the proper utilization of K.S.A. 79-2102 by a tax debtor.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


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