

Approved: 2-8-94  
Date

## MINUTES OF THE HOUSE COMMITTEE ON FEDERAL AND STATE AFFAIRS.

The meeting was called to order by Chairperson Clyde Graeber at 1:30 p.m. on January 31, 1994 in Room 526-S of the Capitol.

All members were present except: Representative Darlene Cornfield, Excused  
Representative Cindy Empson, Excused

Committee staff present: Mary Galligan, Legislative Research Department  
Lynne Holt, Legislative Research Department

Conferees appearing before the committee: Mark Burghart, Department of Revenue  
John C. Frieden, Attorney at Law  
Representative Jim Morrison

Others attending: See attached list

The Chairperson stated there would be a briefing and discussion of the military retirement taxation issue.

Representative Jim Morrison requested legislation concerning pull-tabs. The American Legion has asked for change in the hours of sale - would assist with wheelchairs and crutches to community, etc.

Representative Cox moved and Representative Sebelius seconded to accept Representative Morrison's request as a committee bill.

Mark Burghart, General Counsel, Department of Revenue, briefed the committee on the military retirement taxation issue. On December 17, 1993, Judge Adrian Allen dismissed the class action military retiree refund lawsuit which had been pending in Shawnee County District Court. The court ruled that plaintiffs had failed to pursue and exhaust their administrative remedies. The court further stated that the administrative process provides a full, adequate and complete remedy for tax refund relief. Therefore, the court concluded that it lacked subject matter jurisdiction over the refund issue.

Since the decision, numerous questions have been raised concerning the status of the litigation. In an effort to assist you as you respond to various constituent inquiries, the following documents have been prepared:

1. a short memorandum describing the issues in the case and the current status of the litigation; and
2. a short description of refund request procedures which may be used by military retirees to pursue their administrative remedies for tax years 1990 and 1991. (See Attachment #1)

Representative Sebelius asked if there was a time frame.

Mr. Burghart said the Supreme Court will determine if refunds will be made.

The Chairperson asked if Kansas collected the taxes illegally.

Mr. Burghart replied, at the time it was legal.

Representative Wilk asked if any refunds had been given to date.

Mr. Burghart answered, no.

Representative Plummer asked how long would case be pending?

Mr. Burghart replied, another year from late summer or possibly several years. The Secretary is willing to settle but how much...\$25 to \$30 million and maximum is \$80 to \$85 million.

John C. Frieden, Attorney at Law, gave a briefing on State Income Tax Refunds for Military Retirees, stating

it is hopeful a legislative solution can be found in regard to the refund issue. Approximately 50 telephone calls a day and approximately 100 letters are received from retired military personnel and/or their respective spouses who do not agree with Mr. Burghart's suggestion that fairness is not an issue. We are satisfied that from a legal standpoint the retirees will ultimately prevail, but from a time standpoint, it is estimated that it will take at least an additional two years to resolve the matter in court. (See Attachment #2)

Representative Sebelius asked Mr. Frieden how long it would be before a settlement would be made.

Mr. Frieden replied, 17 states have resolved this issue - 4 or 5 are holding out. The state offered \$72 million over 2 years.

Representative Kline asked Mr. Burghart if he had anything to add.

Mr. Burghart replied, the District Court does not have any jurisdiction to refunds.

Representative Kline requested the Court's Decision.

Representative Krehbiel stated that retirement plans are different, why are they taxed differently...does the legislature need to make all retirement plans equal?

Mr. Frieden replied, few people will be affected by this action; retirees and spouses in this class. The Court will decide.

Representative Wilk requested a copy of the Opinion.

The meeting adjourned at 2:40 PM

The next meeting will be February 1, 1994

STATE OF KANSAS

Nancy Parrish, Secretary of Revenue  
Robert B. Docking State Office Building  
915 S.W. Harrison St.  
Topeka, Kansas 66612-1588



(913) 296-3041  
FAX (913) 296-7928  
Information (913) 296-3909

Department of Revenue  
*Office of the Secretary*

**MEMORANDUM**

To: Kansas Legislature

From: Nancy Parrish, Secretary  
Kansas Department of Revenue

Date: January 24, 1994

RE: Military Retiree Refund Litigation

---

On December 17, 1993, Judge Adrian Allen dismissed the class action military retiree refund lawsuit which had been pending in Shawnee County District Court. The court ruled that plaintiffs had failed to pursue and exhaust their administrative remedies. The court further stated that the administrative process provides a full, adequate and complete remedy for tax refund relief. Therefore, the court concluded that it lacked subject matter jurisdiction over the refund issue.

Since the decision, numerous questions have been raised concerning the status of the litigation. In an effort to assist you as you respond to various constituent inquiries, the following documents have been prepared:

1. a short memorandum describing the issues in the case and the current status of the litigation; and
2. a short description of refund request procedures which may be used by military retirees to pursue their administrative remedies for tax years 1990 and 1991.

I hope the information will be helpful. Any questions regarding the statutory refund procedures should be directed to Kathleen Smith, Tax Specialist, at 913-296-3059.

FISA  
1-31-94  
Atch #1

## BARKER v. KANSAS

### Background

In 1989 the United States Supreme Court ruled in *Davis v. Michigan Dept. of Treasury* that states may not tax federal civil service retirement benefits while exempting state and local government retirement benefits. Shortly after *Davis* was decided, a lawsuit was filed challenging the taxation of military retirement pay under the Kansas Income Tax Act. For many years Kansas had taxed nondisability military retired pay but exempted state and local government retirement benefits. The lawsuit was certified as a class action with the Plaintiff Class consisting of over 14,000 military retirees residing in Kansas who have paid state income tax on their retirement pay.

Although the taxation of military retired pay was upheld by both the trial court and the Kansas Supreme Court, the Supreme Court of the United States in 1992 invalidated the tax and remanded the case to the Kansas Supreme Court. The Kansas Supreme Court subsequently remanded the case to Shawnee County District Court where it originated. Shortly after the issuance of the United States Supreme Court decision, the Kansas Legislature corrected the constitutional violation by enacting Senate Bill No. 215 (1992) which exempts all types of federal retirement benefits, including nondisability military retired pay, from Kansas income tax.

### Recent Court Rulings

Several issues were raised by the parties on remand. Plaintiffs sought refunds of all income taxes paid by members of the Plaintiff Class during years 1984-1991 and an award of attorney's fees pursuant to 42 U.S.C. § 1988. Defendants sought to have the Plaintiff Class decertified and to have plaintiffs' refund claims dismissed for lack of subject matter jurisdiction.

On December 17, 1993, the Shawnee County District Court granted defendants' motion to dismiss plaintiffs' refund claims. The court ruled that plaintiffs had failed to pursue and exhaust their administrative remedies which provide a full, adequate and complete remedy for tax refund relief. Accordingly, the court determined it lacked subject matter jurisdiction over the issue of refunds.



## Current Status of Litigation

Plaintiffs have filed an appeal from the district court's ruling with the Kansas Court of Appeals. There are also several issues that remain pending before the district court.

1. Plaintiffs have sought a permanent injunction to prevent the Kansas Department of Revenue from initiating any assessment, collection or enforcement proceedings to collect tax on military retired pay for tax years 1984-1991. The court is presently considering this matter.

2. The court has not yet ruled on defendants' motion to decertify the Plaintiff Class.

3. The court has stated it will defer ruling on plaintiffs' motion for an award of attorney's fees.

4. Plaintiffs have indicated they may file a motion to reopen the statute of limitations to permit military retirees to file refund claims with the Director of Taxation for tax years 1984-1989 if such refund claims have not already been filed. To date, no such motion has been filed.

## The Issue of Income Tax Refunds

Since the district court dismissed plaintiffs' refund claims on jurisdictional grounds, there has been no ruling on the substantive question of whether plaintiffs are entitled to receive refunds. The ultimate determination of this issue will depend, in large part, upon application of the principles announced by the United States Supreme Court on June 18, 1993 in *Harper v. Virginia Dept. of Taxation*.

In *Harper*, the Virginia Supreme Court had previously ruled that the *Davis v. Michigan* decision did not apply retroactively and Virginia was therefore not required to refund taxes collected from federal civil service and military retirees in years prior to 1989. The Supreme Court reversed this ruling and stated that *Davis* applies retroactively. The Court emphasized, however, that Virginia was not necessarily required to pay refunds. Whether refunds are due, the Court said, is a question of state law which the Virginia courts must address. The case was remanded to the Virginia Supreme Court for this purpose.

*Harper* states that the first question to be asked in determining the appropriate remedy is whether a state provides an adequate "predeprivation process," such as a statute authorizing taxpayers to bring suit to enjoin the imposition of a tax prior to its payment or allowing taxpayers to withhold payment and raise their objections to the tax at a hearing or enforcement proceeding. Kansas does have a statute permitting taxpayers to "enjoin the illegal levy of any tax, . . . the collection thereof, or any proceeding to enforce the same." [See K.S.A. 60-907(a)]. This statute and other predeprivation remedies available under Kansas law may constitute adequate relief under *Harper* so that the state would not be required to pay refunds.

If a state has no predeprivation remedy or if its predeprivation remedy is determined to be inadequate, a state is then obligated to provide what the Supreme Court has characterized as "meaningful backward-looking relief" to rectify the unconstitutional deprivation. Such relief consists of either full refunds to those burdened by the unlawful tax or some other means of creating in hindsight a nondiscriminatory tax scheme. One example of the latter option would be a retroactive assessment of tax on state and local government retirement benefits for all prior years at issue.

In the event it is determined that refunds must be paid, the state is prepared to offer evidence in support of the position that only the discriminatory portion of the tax, not the full amount of tax paid by military retirees, should be refunded. Since a portion of the pension benefits received by KPERS retirees includes previously taxed employee contributions, KPERS benefits are not entirely tax-exempt. To the extent that KPERS benefits include previously taxed income, the tax on the corresponding portion of military retired pay is not discriminatory and should not be refunded.

### **Administrative Proceedings**

Many military retirees have filed amended returns or refund claims with the Kansas Department of Revenue for one or more of the tax years at issue. The Department has denied these claims. Some retirees have appealed the denial of their claims to the Director of Taxation. An Administrative Hearing Officer designated by the Director will decide these appeals and determine whether refunds are due. The Hearing Officer's order can be appealed to the Kansas Board of Tax Appeals and a final order of the Board can be appealed to the Kansas Court of Appeals.

Kansas law provides for a three year statute of limitations on income tax refund claims. Claims filed for the 1990 tax year would be timely if filed on or before April 15, 1994. Claims for tax year 1991 would be timely if filed on or before April 17, 1995.

# STATE OF KANSAS

Brett H. Robinson, Director  
Robert B. Docking State Office Building  
915 S.W. Harrison St.  
Topeka, Kansas 66625-0001



(913) 296-3044  
FAX (913) 296-7928

Department of Revenue  
*Division of Taxation*

## **MILITARY RETIREE REFUND REQUEST PROCEDURES**

A military retiree requesting a refund of Kansas income tax paid on nondisability military retired pay may do so in one of two ways:

1. file an amended individual income tax return for the tax year in question with the Kansas Department of Revenue; or
2. file a written request for refund with the Director of Taxation which specifically identifies the years for which a refund is requested (a sample letter is attached).

Refund claims under Kansas law are subject to a three-year statute of limitations. Therefore, a refund claim for tax year 1990 must be filed on or before April 15, 1994. A refund claim for tax year 1991 must be filed on or before April 17, 1995. Refund claims for any tax year prior to 1990 would be untimely.

If a refund claim is denied, a taxpayer has the right to appeal that determination by filing a request for hearing with the Director of Taxation. Once a request for hearing is received by the Director of Taxation, the appeal will be docketed by the Director and the taxpayer will be notified of the date set for a prehearing conference. At the prehearing conference the taxpayer and the Department must identify the relevant issues and witnesses which the parties intend to call at the formal evidentiary hearing before the Director. A date for the formal hearing will also be set at the time of the prehearing conference. If the taxpayer is not satisfied with the ruling of the Director after the formal hearing is conducted, the taxpayer may appeal the Director's decision to the Kansas Board of Tax Appeals.

Any questions regarding the statutory refund procedures should be directed to Kathleen Smith, Tax Specialist, at 913-296-3059.

1-6

Brett Robinson  
Director of Taxation  
3rd Floor  
Docking State Office Building  
Topeka, Kansas 66612

Re: Request for Income Tax Refund

Dear Director Robinson:

I hereby request a refund of state individual income tax which I paid on  
nondisability military retired pay for tax years 1990 and 1991 in the amount of  
\_\_\_\_\_.

Sincerely,



LAW OFFICES OF  
**FRIEDEN, HAYNES & FORBES**

CAPITOL TOWER  
400 S.W. 8TH STREET, SUITE 409  
P.O. Box 639  
TOPEKA, KANSAS 66601

JOHN C. FRIEDEN  
WILLIAM G. HAYNES  
RANDALL J. FORBES  
KEVIN M. FOWLER  
WENDELL BETTS  
S. ERIC STEINLE

TELEPHONE  
(913) 232-7266  
FAX  
(913) 232-5841

February 1, 1994

VIA HAND-DELIVERY

Representative Clyde D. Graeber  
Chairman, House Committee on  
Federal and State Affairs  
State Capitol Building, Rm. 502-S  
Topeka, Kansas 66612

RE: State Income Tax Refunds for Military Retirees

Dear Representative Graeber:

On behalf of the class of military retirees I would like to express our sincere appreciation for the opportunity to appear before your committee yesterday.

We are extremely hopeful a legislative solution can be found in regard to the refund issue. I want to personally assure you that we will meet with you or any other member of the legislature at any time to answer any question you might have.

We are receiving approximately 50 telephone calls a day and approximately 100 letters daily from retired military personnel and/or their respective spouses who do not agree with Mr. Burghart's suggestion that fairness is not an issue. We are satisfied that from a legal standpoint the retirees will ultimately prevail; but from a time standpoint, we estimate that it will take at least an additional two years to resolve the matter in court. We have an aging class so time is very important to us. Additionally, I personally have a strong belief, as I know you do, that each retiree has a right to expect fundamental fairness from their government. In this instance, fairness requires the return of the money which was wrongfully taken from them.

I am enclosing various documents which you and several committee members requested yesterday.

Attachment No. 1 is Judge Allen's Journal Entry, dated December 19, 1989, which advised the retired military community that it was

F+SA  
1-31-94  
Atch #2



Page 2

Letter to Representative Clyde D. Graeber  
February 1, 1994

unnecessary for them to pursue or exhaust administrative remedies to pursue their refund claims. See, for example, pages 5 and 6.

Attachment No. 2 is Judge Allen's Memorandum Decision, dated October 31, 1990, which reiterated that "PLAINTIFFS HAVE PRESERVED THEIR RIGHT TO A REFUND BY THE ORDER OF THIS COURT WHICH RECOGNIZED THAT PLAINTIFFS COULD NOT RECEIVE THE RELIEF SOUGHT FROM THE ADMINISTRATIVE PROCESS DUE TO THE KANSAS DEPARTMENT OF REVENUE'S INABILITY TO DECLARE A STATE STATUTE UNCONSTITUTIONAL." See pages 2 and 3.

Attachment No. 3 contains two sample letters from the Department of Revenue advising military retirees that "IT HAS ALREADY BEEN DECIDED BY THE DISTRICT JUDGE THAT TAXPAYERS ARE NOT REQUIRED TO HAVE ADMINISTRATIVE HEARINGS AND MAY SEEK TO OBTAIN REFUNDS IN THE CLASS ACTION LAWSUIT INSTEAD."

Attachment No. 4 is a letter from the Secretary of Revenue to you, dated July 1, 1992, which represents that "MILITARY RETIREES ARE REQUIRED TO PAY TAX ON MILITARY RETIRED PAY FOR ALL YEARS UP TO AND INCLUDING 1991." The letter recommends that "the officer in question pay his 1991 tax liability" and later seek a refund. Moreover, the Secretary states that until "the courts determine that the State is required to refund these taxes . . . these taxes remain legally due."

Attachment No. 5 are excerpts of sworn testimony from Bob Clelland, Chief of the Department's Income Tax and Inheritance Bureau, which confirms that the Department of Revenue has consistently advised military retirees to pay the contested income tax and later seek a refund.

Attachment No. 6 is an affidavit from David Lowell which reflects his experience in attempting to withhold payment of the illegal tax on his military retired pay. After Mr. Lowell refused to pay the tax for 1989, the Department of Revenue issued an assessment of tax, interest and penalty, which he timely appealed to the Director of Taxation. Although Mr. Lowell has never received a hearing on his assessment appeal and the matter remains pending, the Department actually collected the assessment of tax, interest and penalty by reducing the amount of his income tax refund check for tax year 1990.

Attachment No. 7 is an analysis of the various states who have either resolved the refund issue or are in the process of resolving the issue. As I indicated to the committee, four or

2-2

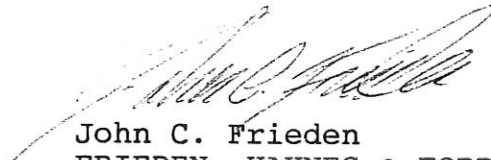
Page 3  
Letter to Representative Clyde D. Graeber  
February 1, 1994

five states, including Kansas, still refuse to make meaningful progress and continue to make it as difficult as possible on the retirees to seek the return of taxes wrongfully extracted from them.

Mark Burghart confirmed for the Committee that **THE DEPARTMENT OF REVENUE WILL TAKE NO FURTHER ACTION TO ASSESS OR COLLECT TAX ON MILITARY RETIRED PAY** from military retirees who refused to pay the tax for years before 1992. While this position is certainly appropriate, continued opposition to refund illegal taxes actually paid by military retirees during the same period is manifestly unjust.

If you have any questions or require further information, please advise.

Very truly yours,



John C. Frieden  
FRIEDEN, HAYNES & FORBES

Attachments: As stated

2-3

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION FOUR

DISTRICT COURT  
SHAWNEE COUNTY, KANSAS  
DEC 19 3 42 PM '89

KEYTON BARKER and PAULINE BARKER, et al.,

Plaintiffs,

and

ANTHONEY E. CORCORAN, et al.,

Intervenor/Plaintiff,

vs.

STATE OF KANSAS, et al.,

Defendants.

No. 89-CV-666

(CONSOLIDATED)

WILLIAM J. LOBER, JR. and  
MARJORIE E. LOBER, et al.,

Plaintiffs,

vs.

STATE OF KANSAS, DEPARTMENT OF REVENUE,

Defendants.

No. 89-CV-1100

JOURNAL ENTRY

NOW on this 13th day of November, 1989, the above-captioned consolidated action is before the Court, pursuant to notice, for hearing and disposition of Defendants' motions to dismiss and Plaintiffs' amended joint motion for class certification. Plaintiffs in Case No. 89-CV-666 appear by their attorneys, John C. Frieden and Kevin M. Fowler; Plaintiff/Intervenor Corcoran appears by his attorneys, Kenton C. Granger and Angela K. Green; Plaintiffs in Case No. 89-CV-1100 appear by their attorney,

#1  
2-4

Terence A. Lober; and Defendants appear by their attorneys, James Bartle and Mark Burghart. There are no other appearances.

WHEREUPON, after reviewing the pleadings, memoranda, affidavits, documents of record, hearing the arguments of counsel, and being otherwise well and fully advised in the premises, the Court issues the following Findings of Fact and Conclusions of Law:

I

FINDINGS OF FACT

1. The statements of fact set forth in the Affidavit of Keyton E. Barker, Jr., Affidavit of Pauline Barker, Affidavit of William E. Richards, Affidavit of Ollun E. Richards, Affidavit of John G. Fowler, Affidavit of Carol B. Fowler, Affidavit of Leonard W. Williams, Affidavit of Loneta S. Williams, Affidavit of Clarence Wolf, Affidavit of Flora B. Wolf, Affidavit of Anthony E. Corcoran, Affidavit of William J. Lober, Jr., Affidavit of Roger W. Clay, Affidavit of Leland W. Keister, Jr., Affidavit of Roger J. Olson, Affidavit of Edward F. Kellogg, Affidavit of Joesph Marshall, Affidavit of John Luttjohann, Affidavit of Kevin M. Fowler and Affidavit of John C. Frieden, each of which is duly filed with the Court without objection by the parties, are accepted as true for purposes of Defendants' motions to dismiss and Plaintiffs' joint motion for class certification, and are hereby incorporated by reference as though fully articulated herein.

2. The parties have also executed a Stipulation of Authenticity of Specific Documents which was filed with the Court

on November 9, 1989. The Court does hereby accept this stipulation and finds that the documents attached thereto are authentic.

3. Based upon Davis v. Michigan Department of Treasury, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), 4 U.S.C. § 111 and the Supremacy Clause of the United States Constitution, the Privileges and Immunities Clause of the Fourteenth Amendment, and Article 11, § 2 of the Kansas Constitution, all named Plaintiffs and the class they seek to represent allege that Kansas state income taxation of military retired pay, as legislatively imposed under the Kansas Income Tax Act [K.S.A. 79-3201 et seq. as amended], is unconstitutional. None of the parties have offered or identified any non-constitutional basis for decision.

4. The proposed class involved in these consolidated proceedings consists of all retired members of the federal or United States armed forces who are recipients of federal armed forces retirement benefits [under applicable provisions of Title 10 or Title 14 of the United States Code] subject to Kansas state income taxation during one or more of the tax years from 1984 through 1989 and, where applicable, their respective spouses who have filed or will file joint Kansas state income tax returns during one or more of the tax years from 1984 through 1989. There are approximately 14,100 members of this class and joinder of all members is impracticable.

5. There are questions of law and fact common to each member of the class. Moreover, the claims of all named Plaintiffs are typical of the claims of the class, to wit: Whether Kansas

state income taxation of military retired pay violates our federal and/or state constitutions.

6. Plaintiffs' counsel [FRIEDEN, HAYNES & FORBES; NIEWALD, WALDECK, NORRIS & BROWN, P.C.; and DAVIS, BEALL, MCGUIRE & THOMPSON, Chartered] are qualified, experienced and capable of conducting the proposed class action litigation. In addition, the conduct of these proceedings demonstrates that the current parties are not involved in a collusive suit and there is no evidence of record which suggests otherwise.

7. The interests of the named Plaintiffs do not conflict with nor do they appear to be antagonistic in any way with the interests of other members of the class. Likewise, Plaintiffs' interests in the subject-matter are at least co-extensive with the interests of other members of the class.

8. The named parties Plaintiff in these consolidated proceedings, with the assistance of their attorneys, will adequately represent and protect the interests of the class involved herein; and all such named Plaintiffs should be designated as class representatives. Furthermore, the law firms of FRIEDEN, HAYNES & FORBES; NIEWALD, WALDECK, NORRIS & BROWN; and DAVIS, BEALL, MCGUIRE & THOMPSON, should be designated as class counsel.

9. Defendants have conceded that neither the Director of Taxation of the State of Kansas nor the Board of Tax Appeals ["BOTA"] is authorized or empowered to grant any Plaintiff or class member any relief from Kansas income taxation at issue in these proceedings. Defendants therefore have acted and refused



to act on grounds generally applicable to the class.

10. Separate actions by individual class members would create a risk of individual adjudications which would, as a practical matter, dispose of the interests of non-parties similarly situated or substantially impede or impair the ability of such non-parties to protect their interests.

11. Under the circumstances presented, pursuit and exhaustion of existing administrative remedies by any Plaintiffs and members of the class involved herein would be futile. Moreover, the limited state income tax refund remedy is inadequate and the administrative process is fraught with lengthy delays that will serve no useful purpose.

## II

### CONCLUSIONS OF LAW

1. This Court has judicial power and such jurisdiction in its respective district as may be provided by law. KAN. CONST., art. 3 at §§ 1 and 6(b). The broad scope of such authority has been specified by the Kansas Legislature in K.S.A. 20-301, which grants this Court "general original jurisdiction of all matters, both civil and criminal, unless otherwise provided by law, and also . . . such appellate jurisdiction as prescribed by law." Since the power to decide the subject-matter of this civil action has not been expressly withheld nor ceded exclusively to another tribunal, this Court has original jurisdiction.

2. Exhaustion of administrative remedies may be required in tax matters where there exists a full and adequate administrative remedy provided by statute. However, exhaustion is

not required where the remedy is inadequate or recourse to the administrative process would be futile. In this case, application of the exhaustion doctrine is not appropriate because the administrative process is incapable of providing any Plaintiff and member of the class with any form of relief. The only available administrative remedy [e.g., the income tax refund mechanism] is therefore inadequate and pursuit of this remedy would be futile.

3. Application of the exhaustion doctrine is also not appropriate in this case because the questions presented are inherently judicial, they do not involve administrative discretion and they do not require administrative expertise. Consequently, administrative factfinding and proceedings will not assist the Court in resolution of the issues presented for decision.

4. Plaintiffs have filed proper petitions, affidavits and documents sufficient to establish a prima facie set of facts sufficient to warrant certification of these proceedings as a class action under the provisions of K.S.A. 60-223(a), (b)(1), and (b)(2). The Court therefore certifies these consolidated proceedings as a class action under K.S.A. 60-223(b)(1) and (b)(2); designates all named Plaintiffs as class representatives; defines the Plaintiff class as:

All retired members of the federal or United States armed forces who are recipients of federal armed forces retirement benefits [under applicable provisions of Title 10 or Title 14 or the United States Code] subject to Kansas state income taxation during one or more of the tax years from 1984 through 1989 and, where applicable, their respective spouses who have filed or will file joint Kansas state income tax returns during one or more of the tax years from 1984 through 1989;

and designates class counsel as the law firms of FRIEDEN, HAYNES & FORBES; NIEWALD, WALDECK, NORRIS & BROWN, P.C.; and DAVIS, BEALL, MCGUIRE & THOMPSON, Chartered.

5. No notice of this Order shall be required, but a copy hereof shall be attached to any class notices which may be hereafter required by the Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' motions to dismiss should be and are hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' amended joint motion for class certification should be and is hereby granted.

DATED this 19<sup>th</sup> day of December, 1989.



ADRIAN ALLEN  
District Court Judge

DISTRICT COURT  
JUDICIAL DISTRICT  
OCT 31 12 06 PM '90  
KANSAS

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION FOUR

KEYTON BARKER and PAULINE BARKER, et al.,  
Plaintiffs,  
and  
ANTHONY E. CORCORAN, et al.,  
Intervenor/Plaintiff,  
vs.  
STATE OF KANSAS, et al.,  
Defendants.

No. 89-CV-666

(CONSOLIDATED)

WILLIAM J. LOBER, JR. and  
MARJORIE E. LOBER, et al.,  
Plaintiffs,  
vs.  
STATE OF KANSAS, DEPARTMENT OF REVENUE,  
Defendants.

No. 89-CV-1100

MEMORANDUM DECISION AND ORDER

This matter comes before the Court on plaintiffs' motion for summary judgment on the issue of liability. The defendants have responded to plaintiffs' motion and have also moved for summary judgment on the issue of whether the defendants can be held

#211



liable under 42 U.S.C. § 1983.

All named plaintiffs served at least twenty (20) years in the United States Armed Forces which include the Army, Navy and Air Force. They have been noncommissioned and commissioned officers. All named plaintiffs are Kansas residents who have paid and continue to pay Kansas income taxes. Named plaintiffs represent a certified class of approximately 14,000 federal military retirees in the State of Kansas. Journal Entry at 3, para. 4 (Dec. 19, 1989).

Plaintiffs brought this action challenging the Kansas Income Tax Act (KITA) (K.S.A. § 79-3201 et seq.) claiming it discriminates against federal military retirees and therefore, is unconstitutional because it violates 4 U.S.C. § 111 and the Supremacy Clause of the United States Constitution, the constitutional doctrine of intergovernmental tax immunity, the Privileges and Immunities Clause of the Fourteenth Amendment, and article XI, § 2 of the Kansas Constitution. Second Amended Petition at 9 & 11 (Sept. 22, 1989). Plaintiffs allege defendants deprived plaintiffs of their civil rights in violation of the United States Constitution, the Fourteenth Amendment and 42 U.S.C. § 1983. Id. at 10.

Plaintiffs also request a refund of Kansas income taxes since 1984, with interest, which are allegedly overpayments. Id. at 13. Plaintiffs have preserved their right to a refund by the order of this Court which recognized that plaintiffs could not receive the relief sought from the administrative process due to

the Kansas Department of Revenue's inability to declare a state statute unconstitutional. Journal Entry at 5-6, para. 2 & 3 (Dec. 19, 1989).

#### CONCLUSIONS OF LAW

Federal income tax is based upon the taxpayer's federal adjusted gross income pursuant to provisions of the Internal Revenue Code. See 26 U.S.C. §§ 61 to 134. Federal adjusted gross income includes federal military retired pay, federal civil service retirement pay and retirement benefits paid to the States' civil service retirees, such as retired members of the Kansas Public Employees Retirement Systems.

Kansas income tax is based upon the taxpayer's Kansas adjusted gross income. An individual's federal adjusted gross is modified pursuant to K.S.A. § 79-32,117 to calculate his Kansas adjusted gross income. To arrive at an individual's Kansas adjusted gross income, his federal adjusted gross income is reduced by the amount received from the federal civil service retirement and disability fund, amounts received by retired railroad employees as a supplemental annuity, and amounts received from the Kansas Employee Retirement Systems by retired members. K.S.A. §§ 79-32,117(c) (1989) and 74-4924 (1985). The Kansas adjusted gross income includes the amount received from military retired pay and therefore, military retirees pay taxes on military retired pay. See K.S.A. § 79-32,117 (1989).

Plaintiffs brought this action challenging the Kansas Income



Tax Act and request tax refunds as a response to the United States Supreme Court decision in Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). In Davis, the plaintiff, a retired Federal Government employee receiving federal civil service retirement benefits, challenged the Michigan state income tax. The Michigan state income tax act taxed federal civil service retirement benefits while exempting state civil service retirement benefits. Therefore, the plaintiff claimed the Michigan income tax scheme was unconstitutional under the doctrine of intergovernmental tax immunity and 4 U.S.C. § 111.

The doctrine of intergovernmental tax immunity has its roots in McCulloch v. Maryland, 4 Wheat 316, 4 L.Ed. 579 (1819), which held a state could not impose a discriminatory tax on an agent of the United States and thereby, indirectly tax the Federal Government. This doctrine was more fully developed in Helvering v. Gerhart, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938), and in Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927 (1939). In Helvering the Supreme Court held that the Federal Government could levy nondiscriminatory taxes on the incomes of most state employees. The Supreme Court in Graves held federal employees were subject to nondiscriminatory taxes levied by the States. "After Graves, therefore, intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt."

Davis, 103 L.Ed.2d at 902.

The principle of allowing States to tax the Federal Government "or those with whom it dealt" as long as the tax did not discriminate against the Federal Government was codified in part by 4 U.S.C. § 111. This statute was passed between the announcements of Helvering and Graves and states in pertinent part "[t]he United States consents to the taxation of pay or compensation for personal services as [a federal employee], . . . , by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."

(Emphasis added). After determining that 4 U.S.C. § 111 applies to retired as well as current federal employees, the Supreme Court in Davis states "the relevant inquiry is whether the inconsistent tax treatment is directly related to and justified by 'significant differences between the two classes.'" Davis, 103 L.Ed.2d at 905 (citing Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376, 383, 80 S.Ct. 474, 4 L.Ed.2d 384 (1960)).

Michigan raised the defenses of the State's interest in attracting employees by favoring its employees through tax benefits and the fact that as a general rule Federal Government retirees receive greater retirement benefits than Michigan's civil service retirees. The Supreme Court held these differences did not prove a substantial difference between the two classes which would justify a discriminatory tax treatment. Davis, 103

L.Ed.2d at 905-06. There are equal protection problems with the first argument. Additionally, if Michigan wished to tax retirees receiving high retirement benefits then the State's tax would be based on amount rather than source. Therefore, the United States Supreme Court declared the Michigan income tax statute unconstitutional. Davis, 103 L.Ed.2d at 906.

Unfortunately the Davis case does not provide any further guidance on what would amount to "significant differences" which justifies different tax treatment. This Court must start with the presumption that the Kansas Income Tax Act (KITA) is constitutional. Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 340, 757 P.2d 251 (1988) (citing Tri-State Hotel Co. v. Londerholm, 195 Kan. 748, 408 P.2d 877 (1965)). In order to decide the issue currently before this Court, whether the KITA violates 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity, the Court must examine the military non-disability retired pay and compare it to the Kansas state employee retirement system. All branches of the Armed Forces are governed by similar provisions and therefore, for the sake of this analysis this Court will cite to the statutes which regulate the United States Army.

Title 10 of the United States Code includes several provisions which regulate Army retirees: (1) the Regular Army includes retired officers and enlisted men, 10 U.S.C. § 3075(b)(3); (2) retired officers of the Army may wear their uniform while not on active duty, 10 U.S.C. § 772(c); (3) any

retired member of the Regular Army is subject to recall to active duty, 10 U.S.C. §§ 688(a) and 3504(a); (4) retired members of the Armed Forces who are entitled to pay are subject to the Uniform Code of Military Justice and court-martial jurisdiction, 10 U.S.C. §§ 802(a) and 817(a); (5) officers and enlisted men may retire after 20 years of service, see e.g., 10 U.S.C. §§ 3911, 3914; (6) during their service, members of the Armed Forces do not make contributions to a retirement or pension fund from which their retired pay is later drawn, McCarty v. McCarty, 453 U.S. 210, 214, 101 S.Ct. 2728, 69 L.Ed.2d 589, 594 (1981); (7) military retirees may lose or have their retired military pay reduced if they become an employee of the federal civil service, 5 U.S.C. § 5532.

When considering this system of military retired pay, the United States Supreme Court concluded retired Army officers "are then by law a part of the army." United States v. Tyler, 15 Otto 244, 105 U.S. 244, 26 L.Ed. 985 (1881). The Supreme Court further stated:

It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, . . . , are still not in the military service.

Tyler, 105 U.S. at 246, 26 L.Ed. at 986. (Emphasis in original).

The plaintiffs argue that Tyler should not bear on the outcome of this case because the decision is over one hundred years old. However, Tyler has never been overruled and was



heavily relied upon in McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L.Ed.2d 589 (1981). The plaintiff in McCarty argued his non-disability military retired pay for twenty (20) years of service in the U.S. Army should not be considered community property under California law for purposes of property distribution in his divorce proceedings. Overruling a decision by the California Court of Appeals, the United States Supreme Court agreed with the plaintiff. The Supreme Court concluded "that military retired pay is reduced compensation for reduced current services." McCarty, 69 L.Ed.2d at 599. The Court found the California community property law threatened grave harm to "clear and substantial" federal interests which gave the United States Supreme Court through the Supremacy Clause, U.S. Const., art. VI, cl. 2, authority to override the California law.

In contrast to the military retired pay system, the Kansas Public Employees Retirement Systems (KPERS) puts no requirements upon its retirees. The normal retirement age for a KPERS member is 65 years. K.S.A. § 74-4914(1) (Supp. 1989). Normal retirement may also occur at "age 60 with the completion of 35 years of credited service or at any age with the completion of 40 years credited service." Id. In order to receive any KPERS retirement benefits, the member must have worked at least 10 years and must be at least 55 years of age. K.S.A. § 74-4914(5) (Supp. 1989). If a KPERS member should opt to retire before age 65 the amount of the benefits will be lowered thereby penalizing early retirement. K.S.A. § 74-4915(2) (Supp. 1989). KPERS

members pay 4% of their compensation or wage into the KPERS fund. This contribution is credited to the member's individual account with annual interest. K.S.A. § 74-4919(a) (1985). If the employer is the State of Kansas, the employer contributes 3.1% of the employee's wage to the employee's individual account. K.S.A. § 74-49205 (Supp. 1989). Other KPERS employers contribute 2% of the employee's wage. Id. These contributions, by the employee and employer, are made at the time of the worker's employment and are drawn from when the retirement benefits are paid out. Other than staying alive, no requirements or restrictions are placed on a retired KPERS members. See Kansas Public Employees Retirement Systems, K.S.A. § 74-4901 et seq.

After examining the military non-disability retired pay which is taxed by KITA and KPERS which is exempt from tax under KITA, this Court finds there are substantial differences between the two classes which justifies the disparate tax treatment. Therefore, this Court holds the Kansas Income Tax Act is not unconstitutional nor in violation of 4 U.S.C. § 111. Viewed in toto the military retired system is unique to other retirement systems, especially in light of the fact that military retirees are subject to recall and during active service do not contribute to their retired pay. The absence of contribution during active service by military retirees or by their employer, the Federal Government, is consistent with the Tyler and McCarty decisions which state military retired pay is reduced compensation for reduced current services.



Plaintiffs argue that the characterization of military retired pay of Tyler and McCarty should not apply due to the enactment of the Uniform Services Former Spouses Protection Act, 10 U.S.C. § 1408 and its Kansas equivalent K.S.A. §23-201(b). After the McCarty decision, Congress passed the Uniform Services Former Spouses Protection Act which permits States to treat military retired pay as marital property for purposes of marital dissolution. This enactment was a policy decision by Congress and designed to treat former spouses of military retirees more equitably. In 1987, Kansas amended its Married Persons Act to treat military retired pay as marital property for purposes of divorce, separate maintenance, and annulment. K.S.A. § 23-201 (1988). Prior to this amendment, Kansas had held that military retired pay was not marital property and was nothing more than a future stream of income which will cease at the death of the retiree. Grant v. Grant, 9 Kan. App. 2d 671, 676, 685 P.2d 327 (1984) (citing Powell v. Powell, 231 Kan. 456, 648 P.2d 218 (1982)).

This Court agrees with the defendants that while the Uniform Services Former Spouses Protection Act permitted States to treat military retired pay as marital property, it did not change the legal characterization of military retired pay for any other purpose. See also Cornetta v. U.S., 851 F.2d 1372, 1382 n.3 (Fed. Cir. 1988) ("the legislation did not affect the characterization of military retired pay as reduced compensation for reduced current services"). Plaintiffs argue the Supremacy

Clause applies to the case at bar and therefore, this Court must find the KITA unconstitutional under Davis and 4 U.S.C. § 111. Certainly the Supremacy Clause applies, however, this Court finds that due to the United States Supreme Court's characterization of military retired pay as reduced compensation for reduced current services the KITA must be found constitutional.

Plaintiffs have also brought to the attention of this Court decisions from other state courts which have addressed actions brought by military retirees resulting from the Davis decision. See e.g., Hackman v. Director of Revenue, 771 S.W.2d 77 (cert. denied 110 S.Ct. 718) (Mo. banc 1989); Bohn v. Waddell, 164 Ariz. 74, 790 P.2d 772 (1990). These decisions, which held various States taxation of military retired pay was unconstitutional, are not controlling and this Court is not persuaded by them.

The Court has considered all other issues raised by the parties and finds them to be without merit.

#### CONCLUSION

The Court finds the Kansas Income Tax Act to be constitutional. Plaintiffs' Motion for Summary Judgment on the Question of Liability is denied.

This action does not involve a genuine issue as to any material fact and therefore, the Court grants summary judgment to the defendants on its own motion. Phillips v. Carson, 240 Kan. 462, syl. 3, 731 P.2d 820 (1987).

In light of the findings of the Court, defendants' request

for summary judgment on the issue of whether the defendants can be held liable under 42 U.S.C. § 1983 is moot.

This Memorandum Decision and Order shall serve as the Journal Entry.

Dated this 31<sup>st</sup> day of October, 1990.

  
ADRIAN J. ALLEN  
JUDGE OF THE DISTRICT COURT



KANSAS DEPARTMENT OF REVENUE

Office of the Secretary

Robert B Docking State Office Building

915 SW Harrison St

Topeka Kansas 66612-1588

November 6, 1990

Patricia A. Craft  
8848 Evanston Way  
Kansas City, MO 64138

RE: Kansas Income Tax Appeal  
Docket No. 89-M1487

Dear Mrs. Craft:

Your letter dated October 18, 1990, requests information on the status of your late husband's appeal involving a claim for refund of Kansas income tax paid on military retirement benefits.

Please be advised there is a class action lawsuit currently in progress that has been brought on behalf of all Kansas military retirees and their spouses. This lawsuit will resolve the issue of whether the state of Kansas can tax military retired pay. A district court judge in Topeka recently ruled that the tax is valid and military retirees are not entitled to refunds. However, that decision is being appealed and a higher court will consider this issue some time next year.

The Department of Revenue will schedule your appeal for a hearing before the Director of Taxation if you wish to have a hearing. However, it has already been decided by the district judge that taxpayers are not required to have administrative hearings and may seek to obtain refunds in the class action lawsuit instead.

We hope this provides the information you requested. Please feel free to contact our office if you have any questions.

Respectfully,

Mark A. Burghart  
General Counsel

James Bartle, Attorney

Legal Services Bureau  
Kansas Department of Revenue  
Docking State Office Building  
Topeka, KS 66612-1588  
(913) 296-2381

MAB:JB:dw

cc: Ardina Herrera

General Information (913) 296-3909

Office of the Secretary (913) 296-3041 • Legal Services Bureau (913) 296-2381

Audit Services Bureau (913) 296-7719 • Planning & Research Services Bureau (913) 296-3081

Administrative Services Bureau (913) 296-2331 • Personnel Services Bureau (913) 296-3077

# 3  
2-23



KANSAS DEPARTMENT OF REVENUE  
*Division of Taxation*  
Robert B. Docking State Office Building  
Topeka, Kansas 66625-0001

October 18, 1991

EXAMPLE

RE: Military Retirement Appeal  
Refund Denial Date: 8-26-91  
Social Sec. Number: 521-48-5491  
Docket Number:

Please be advised that your petition for a hearing before the Director of Taxation concerning the taxation of Military Retirement Benefits has been received and docketed by this office. This docket number applies to the appeal of your recent refund denial.

There is a class action lawsuit currently in progress that has been brought on behalf of all Kansas military retirees and their spouses. This lawsuit will resolve the issue of whether the state of Kansas can tax military retired pay. A district court judge in Topeka ruled October 31, 1990, the tax is valid and military retirees are not entitled to refunds. That decision was appealed to the Kansas Supreme Court where again the Court ruled July 12, 1991, the tax was valid and military retirees were not entitled to refunds. We anticipate that the decision from the Kansas Supreme Court will be appealed to the U.S. Supreme Court in the near future.

The Department of Revenue will schedule your appeal for a hearing before the Director of Taxation if you wish to have a hearing. However, it has already been decided by the district judge that taxpayers are not required to have administrative hearings and may seek to obtain refunds in the class action lawsuit instead.

Point of contact for this petition is Kathleen M. Smith, Problem Resolution Officer, Director of Taxation's Office, Kansas Department of Revenue, Topeka, Kansas, 66625-0001, (913) 296-3059.

Every military retiree who has requested a hearing before the Director of Taxation may appear in person or be represented by an attorney admitted to practice before the Courts of this state as provided by Kansas Statutes Annotated 7-104. Said hearing will commence and be conducted in accordance with the statutory requirements of an Administrative Proceeding as provided for in the Kansas Administrative Procedure Act, Kansas Statutes Annotated 77-501 et. seq.

Sincerely,

Alisa M. Dotson  
Director of Taxation

2-24



STATE OF KANSAS

Mark Beshears, Secretary of Revenue  
Robert B. Docking State Office Building  
915 S.W. Harrison St.  
Topeka, Kansas 66612-1588



(913) 296-3041  
FAX (913) 296-7928  
Information (913) 296-3909

Department of Revenue  
*Office of the Secretary*

July 1, 1992

Honorable Clyde D. Graeber  
State Capitol, 502-S  
Topeka, Kansas 66612-1591

RE: Taxation of Military Retired Pay

Dear Representative Graeber:

Thank you for your inquiry regarding the retired United States Army officer who is concerned about paying Kansas income tax on his military retired pay received in the 1991 tax year.

In April of this year, the Supreme Court of the United States invalidated the manner in which military retired pay was taxed under the previously existing provisions of the Kansas Income Tax Act. The case was remanded for further proceedings to the Kansas Supreme Court. The Kansas Supreme Court, in turn, remanded this case to Shawnee County District Court. On remand, it will be determined whether the State is required to refund the taxes collected on military retired pay in years prior to 1992.

Shortly after the United States Supreme Court made its ruling, the Kansas Legislature amended K.S.A. 79-37,117 to exempt military retired pay from Kansas income tax beginning in the 1992 tax year. Thus, military retirees are required to pay tax on military retired pay for all years up to and including 1991. The courts will determine if these taxes must later be refunded. However, there will be no tax due on military retired pay in the 1992 tax year.


We recommend that the officer in question pay his 1991 tax liability. Although he obtained an extension, this is an extension of time in which to file the return, not an extension of time in which to pay the tax. He can later file a refund claim or an amended return if the courts determine that the State is required to refund these taxes. Until such an order is issued, however, these taxes remain legally due.

#4  
2-25

Honorable Clyde D. Gruber  
July 1, 1992  
Page 2

I would be happy to answer any further questions that you or the taxpayer might have.

Sincerely,



Mark V. Beshears  
Secretary of Revenue

1 and asked you some questions about a letter from  
2 Mark Beshears, who was our former Secretary of  
3 Revenue, to one of our state representatives,  
4 Mr. Graeber. Do you remember that?

5 A Correct.

6 Q Do you need to look at it again to refresh your  
7 memory about that at all?

8 A I don't believe I do.

9 Q Okay. I believe I am being accurate in saying  
10 that Mr. Beshears told representative Graeber  
11 that under the law as it stood at that time,  
12 military retired pay was subject to Kansas  
13 income tax in tax year 1991. Is that your  
14 understanding of what that letter said?

15 A Yes.

16 Q And without me reciting to you all of the  
17 statements that were made in that letter, would  
18 you say that Mr. Beshears' statements in that  
19 letter are generally consistent with the  
20 information that the people in your department  
21 would provide to military retirees who would  
22 call in with these sorts of questions?

23 A Those statements are correct, would be, yes.

24 Q Do you recall examining a document and answering  
25 some questions earlier which appeared to be a

AFFIDAVIT

STATE OF                    )  
                              ) ss:  
COUNTY OF                 )

COMES NOW David H. Lowell, who having been duly sworn upon his oath, states as follows:

I am a retired officer from the United States Air Force and a member of the class of military retirees certified by the Court in Barker v. Kansas, Civil No. 89-CV-666, residing in this state. On or about March 19, 1990, I filed Kansas Form 40FD showing that I overpaid my 1989 Kansas income tax and requesting a refund in the amount of \$1,014.42. A refund was owing primarily due to the fact that I claimed an exemption from Kansas income tax for my military retired pay under the United States Supreme Court's decision in Davis v. Michigan. On April 13, 1990, the Kansas Department of Revenue wrote me a letter requesting additional information to support my refund claim and asking for my birthdate regarding the military retirement credit.

I responded to this letter approximately two weeks later providing the requested information. On June 13, 1990, the Department of Revenue responded notifying me that "There is no modification for military retirement and demanding payment to the State in the amount of \$243.69." This notice also advised that "Your account will be referred to the Collections Division if response is not received." I was further advised that if I objected to this action, I should file a request for hearing

EXHIBIT J

#628  
2-28



within thirty (30) days stating the grounds of my objection to the Department's action.

In accordance with the instructions contained in the June 13, 1990, Department of Revenue notice, I filed a request for hearing with the Department on June 28, 1990, claiming a refund on the grounds that taxation of my military retired pay was prohibited by the principle of intergovernmental tax immunity and 4 USC Section 111. Shortly before my response (of June 28, 1990) I also filed a form K40X on June 25, 1990, seeking to negate the \$243.69 balance due and to receive the \$1014.42 refund claimed in the 1989 K40FD tax return. This request for hearing and the form K40X were transmitted to Kansas Department of Revenue by certified mail. No response was ever received from the Department to either of these refund claims.

On March 22, 1991, I filed my 1990 Kansas income tax return claiming a refund due me of \$807.90. On April 9, 1991, the State of Kansas issued me a refund check in the amount of \$481.36. The face of the check indicated that my "[r]efund request ha[d] been reduced by a prior balance." The only prior balance claimed to exist by the State was the \$243.69 amount due claimed on my 1989 return as a result of its denial of my exemption claim for military retirement pay. The total reduction of \$326.54 offset by the State from my 1990 refund claim was \$82.85 more than the amount previously claimed due the State. This additional amount taken by the State while my hearing request was pending constituted an assessment of penalties and interest of 33.99% on the amount claimed to be due (\$82.85/243.69



= 33.99%). No hearing has ever been provided me on this refund claim.

True and genuine copies of the relevant documents and correspondence referred to in this affidavit are attached hereto and incorporated herein as part of this affidavit.

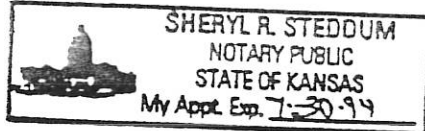
Further affiant sayeth not.

  
David H. Lowell

SUBSCRIBED and SWORN to before me this 9<sup>th</sup> day of September, 1993.

  
Notary Public

My appointment expires:





KANSAS DEPARTMENT OF REVENUE

DIVISION OF TAXATION

Robert B. Docking State Office Building  
Topeka, Kansas 66625-0001  
(913) 296-3051

April 13, 1990

David H. and Margaret Lowell  
643 Oak Court  
Derby, KS 67037

RE: 1989 Individual Income Tax  
SS #518-38-7079

Dear Mr. and Mrs. Lowell:

A review of your Kansas individual income tax return indicates that you must submit the following information before your return can be processed.

A copy of Federal Schedule A, itemized deductions.

Please provide your birthdate for military retirement credit.     /     /

Please forward the information requested above to this office within twenty (20) days, accompanied by a copy of this letter, so that your income tax return may be processed.

INCOME AND INHERITANCE TAX BUREAU  
PRE EDIT UNIT  
FOR THE DIRECTOR OF TAXATION

SKS:1/470/1528/8

ENC: Env.



# KANSAS DEPARTMENT OF REVENUE

## Division of Taxation

Robert B. Docking State Office Building  
Topeka, Kansas 66625-0001

JUNE 13, 1990

(913) 296-3051

LOWELL, DAVID H  
643 OAK COURT  
DERBY

& MARGARET

KS 67037

SS # 518-38-7079  
Ser. # 90-89-1309705  
Tax Year 1989

In checking your income tax return, it was necessary to make adjustments for the reasons shown below.

THERE IS NO MODIFICATION FOR MILITARY RETIREMENT. IF YOU ARE OVER 62, YOU HAVE BEEN ALLOWED A DIRECT TAX CREDIT

YOUR TAX INFORMATION HAS BEEN TRANSFERRED FROM THE K40FD YOU FILED TO A K40. THE K40 TAX COMPUTATION METHOD OFFERS YOU A SMALLER TAX LIABILITY.

Federal adjusted gross income	89,056.00
Modifications	
Kansas adjusted gross income	89,056.00
Std. or itemized deductions	14,775.00
Federal income tax deduction	
Personal exemption	10,000.00
Total deductions	24,775.00
Taxable income	64,281.00

Tax	2,786.00
Nonresident allocation percentage	
Nonresident tax	
Tax on lump sum distributions	
Total Kansas tax	2,786.00

Tax paid other state(s)	
Other nonrefundable credits	
Total nonrefundable credits	

Balance	2,786.00
---------	----------

Kansas income tax withheld	2,542.31
Estimated tax paid	
Amount paid with state extension	
Handicapped accessibility and/or child day care assistance refund	
Cash received	
Total prepaid credits	2,542.31

Penalty	
Interest	
Estimated tax penalty	
Total tax, penalty & interest	243.69

Previous Balance

### TOTAL BALANCE DUE

IMPORTANT: A copy of this letter must accompany your check or money order to ensure proper credit to your account. Please make your remittance payable to Kansas Income Tax. Your account will be referred to the Collections Division if response is not received. A balance due of less than \$5.00 need not be paid.

243.69

### REFUND

Your refund will be mailed as shown unless adjusted by a previous balance due.  
AN OVERPAYMENT OF LESS THAN \$5.00 WILL NOT BE REFUNDED.

### CREDIT FORWARD

JUNE 12, 1940

TELEGRAM

LOVELL, DAVID H  
P.O. BOX 1001  
TOPEKA, KS

218-38-3032  
218-38-3032  
218-38-3032

If you feel aggrieved by this assessment notice, you may petition the Director of Taxation for a hearing, stating definitely, and in detail, each particular item in the audit report to which you object, together with the reasons for your objections. Such petition must be filed in triplicate with the Director of Taxation, Docking State Office Building, Topeka, KS 66625-0001, within thirty (30) days from the mailing of this notice.

If no petition for a hearing is made within the time specified above, the total additional tax, penalty and interest will be due and payable within thirty (30) days from the mailing of this notice. Please enclose one copy of this notice with your check and mail to Kansas Department of Revenue, P.O. Box 12001, Topeka, Kansas 66612-2001.



Mr. Steven Stotts  
Director of Taxation  
Kansas Department of Revenue  
Docking State Office Building  
Topeka, KS 66625-0001

28 JUNE, 1990

Re: Request for Hearing of Denial of Claim for Income Tax Refund  
of DAVID H & MARGARET M. LOWELL 518-38-7079  
taxpayer(s) name(s) SSN  
643 OAK COURT D., DEERY, KS 67037  
address zip  
for tax years 1989

Dear Mr. Stotts:

In a notice dated June 13 1990, we were advised by the Department of Revenue that our claim for refund of Kansas income taxes paid on military retirement benefits for the year (X) 1989 had been denied. Pursuant to K.S.A. 79-3226, et seq., we do hereby object to the ruling of the Department and do request a hearing of the refund denial for the reasons outlined below.

We object to the Department of Revenue's denial of our claim upon the grounds that taxation of military retirement benefits is in violation of the Constitution of the United States, the requirements of federal law, and the Constitution of the State of Kansas. Such taxation violates the constitutional principle of intergovernmental tax immunity and of 4 U.S.C. § 111 by imposing discriminatory taxation against us on account of one's service to the government of the United States. In addition, the right of a retired member of the military forces to be free of discriminatory state taxation imposed on account of that relationship is an immunity of national citizenship protected under the privileges and immunities clause of the United States Constitution, which right has been violated. These rights are among those protected by 42 U.S.C. § 1983, upon which we also base our claim for refund. In addition, the State's arbitrary taxation of such benefits is prohibited by Article 11, § 2 of the Kansas Constitution.

Following consideration of this claim, we request that the Department rule that the Kansas Income Tax Act is in violation of the Constitutions of the United States and the State of Kansas, and 4 U.S.C. § 111 and 42 U.S.C. § 1983 as applied to retirement benefits received on account of service in the Armed Forces of the United States. We request that the Department discontinue its taxation of such benefits in the future and provide us a full refund of all taxes paid by us in excess of the amounts legally due, including interest at the prescribed statutory rate applicable to income tax refunds.

*David H Lowell*

*Margaret M Lowell*

*by David H Lowell,  
Attorney in Fact*





DEPARTMENT OF ADMINISTRATION  
DIVISION OF ACCOUNTS AND REPORTS  
**STATE OF KANSAS**

No. 2555972

TO THE TREASURER OF STATE:  
INCOME TAX REFUND

TOPEKA, KANSAS

2555972

FOUR HUNDRED EIGHTY ONE DOLLARS AND 36 CENTS

FORM DA-3

MO.	DAY	YR.	FUND	AGENCY	ACCT. NO.
04	09	91	9038	565	9370
SOC. SEC. NO.			VAL. NO.		
518	38	7079	0366	141	

PAY TO THE ORDER OF

LOWELL, DAVID H & MARGARET  
643 OAK COURT  
DERBY KS 67037

AMOUNT
*****481.36
CODES

REFUND REQUEST HAS BEEN  
REDUCED BY A PRIOR BALANCE  
THIS WARRANT PAYABLE AT ANY TOPEKA, KANSAS, BANK AT PAR.  
IF CLEARED THROUGH REGULAR BANKING CHANNELS.

CASH IMMEDIATELY

VOID ONE YEAR FROM DATE OF ISSUE

*James H. Pohlen*  
DIRECTOR OF ACCOUNTS AND REPORTS  
*Sup. J. H. Johnson*

⑈ 52555972⑈ ⑆ 101101154⑆ 999⑈ 911⑈

Prior Balance 243.69  
481.36  
725.05

*Reduced Refund on  
1990 Return  
Issued upon 1989 disallowed  
Credit —*

1990 Refund due \$ 807.90  
- 481.36

\$ 326.54  
Back tax collected

\$ 326.54 Collected  
243.69 balance due  
\$ 82.85 penalty & interest  
1 year

\$ 82.85  
\$ 243.69 = 33.99%  
annual  
penalty &  
interest

## SUMMARY OF ACTION IN OTHER STATES

1. Missouri: full refunds and interest paid in installments over three (3) years; approximately \$90 million in refunds; legislative solution;
2. Colorado: full refunds and interest paid with one refund check; approximately \$25 million in refunds; class action continues (approximately \$30 million more at issue);
3. Arkansas: full refunds and interest payable in three installments over 15 month period; approximately \$48 to \$50 million in refunds; class action settlement;
4. Alabama: full refunds and interest paid with one refund check; approximately \$28 million in refunds;
5. Louisiana: full refunds and interest paid in installments over three year period; approximately \$30 million in refunds; class action settlement;
6. New Mexico: full refunds and interest paid with one refund check; approximately \$33 million in refunds;
7. South Carolina: full refunds and interest at one-half the statutory rate; approximately \$75 to \$100 million in refunds; class action settlement
8. Michigan: full refunds and interest pursuant to class action lawsuit after Davis; approximately \$30 to \$40 million in refunds;
9. Arizona: full refunds and interest paid over four years with the use of credits and cash payments; approximately \$100 to \$150 million in refunds;
10. Utah: full refunds and interest; approximately \$60 million in refunds; parties discussing terms of payment in class action;
11. West Virginia: full refunds and interest paid with one refund check to civilian retirees after Davis and to military retirees after Barker; approximate amount of refund liability unknown;
12. Montana: full refunds and interest paid with one refund check for 1988; approximately \$4 million in refunds; Governor seeking legislative approval of additional refunds for 1983 through 1987 (approximately \$16 million); settlement discussions pending in response to legislative directive;
13. Iowa: full refunds and interest; approximately \$40 to \$50 million in refunds pending dispersal;

14. Oklahoma: full refunds and interest; approximately \$30 million in refunds anticipated;

15. Oregon: full refunds and interest within statute of limitations paid with one refund check; approximately \$60 to 80 million in refunds for 1988 and 1989 (no statutory provision for interest); tax year 1987 still at issue in light of Harper; tax years 1990-1993 are at issue because the remedial scheme adopted after Davis (i.e., taxing all government pensions) has been invalidated by the Oregon Supreme Court;

16. Kentucky: trial court has ordered full refunds and interest within the two-year statute of limitations (1987 and 1988); approximately \$35 to \$40 million in refunds for two years; appeal pending before Kentucky Supreme Court; principal issue on appeal is whether the applicable statute of limitations is two years or four years (if four years, refunds may exceed \$70 million);

17. Mississippi: three trials court has ordered full refunds and interest within the period of limitations to named taxpayers; approximately \$47 to \$48 million in refunds at issue.

Settlement discussions are also pending in Wisconsin (agreement in principle between the Governor and retirees to pay \$100 million in refunds over three years) and Virginia.